No. 15689

# United States
# COURT OF APPEALS
## for the Ninth Circuit

HELEN A. DAVENPORT,
*Appellant,*

v.

UNITED STATES OF AMERICA,
*Appellee.*

## APPELLANT'S BRIEF

*Appeal from the United States District Court for the District of Oregon.*



DAVID M. SPIEGEL,
Lawyers Building,
Portland, Oregon,
*Attorney for Appellant.*

STEVENS-NESS LAW PUB. CO., PORTLAND, ORE. 5–58

## TABLE OF CONTENTS


| | Page |
|---|---|
| Jurisdiction | 1 |
| Statement of the Case | 2 |
| Assignment of Error No. I | 16 |
| Points and Authorities | 16 |
| Summary of Argument | 18 |
| Argument | 20 |
| Assignment of Error No. IA | 28 |
| Points and Authorities | 28 |
| Summary of Argument | 30 |
| Argument | 30 |
| Assignment of Error No. II | 42 |
| Points and Authorities | 42 |
| Argument | 42 |
| Assignment of Error No. III | 45 |
| Argument | 45 |
| Assignment of Error No. IV | 46 |
| Points and Authorities | 46 |
| Summary of Argument | 47 |
| Argument | 48 |
| Assignment of Error No. V | 59 |
| Points and Authorities | 59 |
| Argument | 59 |
| Assignment of Error No. VI | 63 |
| Argument | 63 |
| Summary | 63 |
| Appendix | 65 |

## INDEX OF CASES CITED (Cont.)

Page

Sprague v. Aderhalt (Dist. Ct. Ga., 1930), 45 Fed. 2d 790 ..... 46

State v. Van Pelt, 136 N.C. 633, 49 S.E. 177, 188, 68 L.R.A. 760, 1 Annotated Cases 495 ..... 16

Steckler v. U. S. (2d Circuit), 7 Fed. 2d 59, 60 ..... 29, 36

Terry v. U. S., 7 Fed. 2d 28 ..... 55

U. S. v. Amister, 273 Fed. 532 ..... 17

U. S. v. Beiner (Dist. Ct. Pen., 1921), 275 Fed. 704 ..... 17, 24, 28, 31

U. S. v. Britton, 108 U.S. 199, 2 Sup. Ct. 31, 27 Law Ed. 698 ..... 17, 23

U. S. v. Corlin (Dist. Ct. Cal., 1942), 44 Fed. Supp. 940 ..... 29

U. S. v. Cruikshank, 92 U.S. 542, 23 Law Ed. 588 ..... 16, 17, 22, 24

U. S. v. Delaro (2d Circuit, 1938), 99 Fed. 2d 781 ..... 29

U. S. v. Silva (2d Circuit, 1942), 131 Fed. 2d 247 ..... 46, 55

Walker v. U. S., 93 Fed. 2d 383, 395 ..... 59

Weinstock v. U. S. (1955), 231 Fed. 2d 699, 97 U.S. App. D.C. 365 ..... 28

Windsor v. U. S. (6th Circuit, 1923), 286 Fed. 51, certiorari denied, 43 Sup. Ct. 523, 262 U.S. 748, 67 Law Ed. 1212 ..... 47, 55

Wood v. U. S., 41 U.S. 342, 16 Pet. 342, 10 Law Ed. 987 ..... 28, 31

No. 15689

# United States
# COURT OF APPEALS
## for the Ninth Circuit

HELEN A. DAVENPORT,
*Appellant,*
v.
UNITED STATES OF AMERICA,
*Appellee.*

## APPELLANT'S BRIEF

*Appeal from the United States District Court for the District of Oregon.*

## JURISDICTION

Appellant was found guilty of violating Section 371, Title 18, U.S.C.A., Conspiracy, and was sentenced to one year's imprisonment. These proceedings were had in the United States District Court for the District of Oregon.

This Court has jurisdiction of this appeal pursuant to Section 1291, Title 28, U.S.C.A.

## STATEMENT OF THE CASE[1]

Appellant's exact age is not of record. She is so obviously elderly (she is less than five feet tall), that when her counsel asked her how old she was the following transpired (Tr. p. 1420 as corrected):

> "A. Well, they advertised I am 77, but I am going to have a birthday in just a few days.
> Q. That will make you 78?
> (No answer)
> The Court. All right, we won't press her for an answer on that."

Had the matter been pursued it would have been established that the birthday she was going to celebrate would be her 85th. Family records seem to satisfactorily indicate that appellant was born June 26, 1872.

She is a widow and has been a resident of Portland for many year and active in its civic affairs. She is founder of the City's Americanization Council, an association of patriotic organizations devoted to instructing aliens who are to become naturalized citizens in the principles of American citizenship, and is still active in its work (Tr. p. 1422). She has been a past active member of the advisory board of the City's Salvation Army and is now an honorary life member of that board (Tr. p. 1422). In 1954 she was named "Woman of the Year" by the Portland Chamber of Commerce in conjunction with the City's Women's Forum (Tr. p. 1422). She was engaged

---

[1]1 It would probably be impossible in any event to prepare a brief free from all fault and error in a cause of such length. If this Statement of the Case contains "argument," it is because of counsel's attempt to reduce the apparent complexity of the cause to the relatively simple issues appellant wishes to present.

for many years in the insurance business with her late husband under the firm name of the Davenport Insurance Agency.

It is appellant's principle contention that this indictment is mechanically so constructed that although her name appears in its title, it simply fails to include her within its allegations as a defendant charged with a crime. It even goes further than merely omitting her from its allegations: Those allegations of fact that it does contain limit the proof that can be adduced under them to proof of her innocence of any criminal act.

This was a joint trial. The indictment charges nine defendants and contains thirteen counts. The first twelve are substantive counts charging seven of appellant's co-defendants with violations of Section 1341, Title 18, U.S.C.A., Using the mails to defraud, and Section 77q(a), Title 15, U.S.C.A., Fraud in the sale of securities. The thirteenth count is based upon the allegations of fact of the preceding twelve counts (by incorporation by reference), and charges the defendants charged in those counts and appellant and the defendant Williams with violating Section 371, Title 18, U.S.C.A., Conspiracy, by conspiracy to commit the crimes set forth in the substantive counts.

Note that appellant is not charged in any of the substantive counts.

The factual basis of each count of the indictment is the joint activities of those charged in the substantive counts as described in the first paragraph of the first substantive count. It concerns their promotion and

organization of a forest products cooperative called the Mt. Hood Hardboard and Plywood Cooperative, and the sale of memberships therein, as a fraudulent scheme. The first paragraph of the first count describes at length in proper allegations of fact, the joint scheme to defraud that the defendants Errion, Munkers, Wright, Bones, Locke, Montgomery and Martin are charged thereby with having jointly "devised and intended to devise" (and without the aid of appellant or any person "unknown") for the purpose of obtaining money and property from the purchasers of membership in the cooperative by certain specified false representations. This paragraph is thereafter incorporated by reference for the purpose of such allegations of fact in all subsequent counts including the conspiracy count.

The mechanics of this latter count are as follows: It lists the defendants named in the substantive counts together with the appellant and the defendant Williams (against whom the charge was dismissed during trial because of ill health) and states that they:

> "did conspire, combine, confederate and agree with each other to commit the following crimes and offenses against the United States:
>
> "Violations of Section 1341, Title 18 U.S.C., by using, and intending to use, the mails of the United States for the purpose of executing the scheme and artifice to defraud and to take the money and property from purchasers of memberships in the Mt. Hood Hardboard and Plywood Cooperative, as described in the first count of this indictment, which is here and now re-alleged and incorporated by reference;
>
> "Violations of Section 77q(a), Title 15, U.S.C., by employing said scheme and artifice to defraud,

obtaining money and property by means of untrue statements and omissions to state material facts necessary in order to make the statements true, in the light of the circumstances under which they were made, not misleading, and engaging in transactions, practices and courses of business which would and did operate as a fraud and deceit upon purchasers in the sale of the memberships in Mt. Hood Hardboard and Plywood Cooperative by the use of the United States mails, all as described in the preceding counts of this indictment and hereby incorporated by reference;

"Each and all of said acts of the defendants as described in Counts I through XII, inclusive, of this indictment are here and now re-alleged and incorporated herein and designated as overt acts done by the said defendants in pursuance of said conspiracy and to effect the objects of said conspiracy; and in pursuance of said conspiracy and to effect the objects thereof, the defendants performed additional overt acts, including, among others, the following, to-wit:"

From the foregoing appellant concludes that the indictment contains no allegations of fact concerning her.

She is not named as an accused in the substantive counts ,nor does her name even appear in the body of those counts. They therefore contain no allegations of fact against her. The conspiracy count contains no independent allegations of fact, and therefore it contains no allegations of fact against her. The conspiracy count charges the existence of a conspiracy agreement upon her part only as a conclusion of law (as it does against all of the accused except for the incorporation by reference of the allegations of fact of the sub-

stantive counts) and as to her this conclusion is not one that can be drawn from these allegations.

The fact that appellant's co-defendants jointly devised the scheme described in the substantive counts and committed the crimes therein set forth, and nothing more, will not support a conclusion of fact or law that appellant is guilty of having agreed to their scheme and/or crimes. There is omitted from this indictment any allegations of fact against appellant. There are particularly omitted those allegations of fact setting forth the substance of a conspiracy agreement upon her part, which in its terms embraces the totally separate and distinct crimes and acts of her co-defendants set forth in the substantive counts.

Were it possible for an accused to waive the defect of being charged by a bare conclusion of law, the only corresponding benefit to the prosecution that could ensue would be permission to adduce evidence without preceding allegations of fact. Even this is irrelevant in this cause. There *are* allegations of fact set forth in the substantive counts of the indictment. The evidence adduced was necessarily intended to prove nothing more and nothing different than those allegations against those charged with the same, whether considered as such or as incorporated into the conspiracy count. Further, each and every act of the substantive counts are directly alleged to be overt acts upon the part of those charged therein. Because appellant cannot be held responsible for the criminal acts of others except by reason of a prior relationship making her responsible therefor, evidence of the overt acts of her co-defendants

is irrelevant as to her until evidence is first adduced of a conspiracy agreement upon her part making her responsible therefor.[2] Since the only allegations of fact contained in the indictment are alleged to be overt acts performed by her co-defendants, all that was and could be proven in this cause under these allegations, in so far as appellant is concerned, were these overt acts of her co-defendants, and nothing more to render them admissible against her.

There is even more to the matter than this, however: In the allegations contained in the first paragraph of the first count, it is charged that those defendants accused thereby "controlled" a corporation named the Davenport Corporation. The indictment alleges that these defendants caused this corporation to enter into a contract with the cooperative by means of which a large portion of the moneys paid in for memberships was converted to their use. It further alleges that these defendants caused options to be obtained upon real property for a plant site in the name of this corporation, and then purchased the property in its name and resold it to the cooperative at a large profit to themselves and the corporation they controlled.[3]

---

[2] Under allegations of fact against her permitting the same.

[3] "As a further part of said scheme and artifice, said defendants would and did cause said Mt. Hood to enter into a contract with The Davenport Corporation, a corporation controlled by defendants, as a means by which said Davenport Corporation would and did claim and receive and convert to the use and benefit of defendants a large portion of the moneys which had been received from said purchasers of Mt. Hood memberships; and as a further part of said scheme and artifice and in order to make secret profits for themselves, said defendants would and did cause agents, employees, and officers of Mt. Hood to procure options in the name

A corporation is an artificial entity that can only act through its officers. Proof of the foregoing allegations required that the officers of the Davenport Corporation be identified and that evidence be adduced that they acted in conformance with these allegations. It also required that the relationship to them of the defendants charged be shown so as to establish that these officers were "controlled" by these defendants and that therefore these defendants are to be held directly responsible for their acts.

It so happens that appellant was President and principal stockholder of this corporation. In the course of this proof, therefore, she was identified as such and evidence was adduced that the corporation, through her, acted in conformance with the foregoing allegations. Further evidence was adduced of the surrounding circumstances to prove that she did so under the "control" of the defendants. There can be no other conclusion than that the evidence that touched upon appellant was introduced into the cause under these allegations and for the purpose of proving them against those charged in the substantive counts. When the prosecution rested, this was the status of the "case" against appellant.

Appellant can only guess how this indictment came to be drawn as it is. Apparently, proper procedural rules were followed to reach an erroneous substantive conclusion. Rule 8 of the Federal Rules of Criminal

---

of said Davenport Corporation on real estate which was to be purchased by Mt. Hood, and would and did obtain funds from Mt. Hood with which to purchase said real estate in the name of said Davenport Corporation, and would and did then resell said real estate of Mt. Hood at great profit to said Davenport Corporation and defendants."

Procedure provides that it is not necessary that every defendant be named in every count. It needs no citation of authority, therefore, to point out that it is not necessary, where substantive counts and a conspiracy count are joined, that a defendant be charged in a substantive count in order to be charged in the conspiracy count.[4] There is likewise a common practice of crowning a series of joint substantive offenses with a conspiracy count based upon them and, in such instance, of incorporating by reference the allegations of fact of the substantive counts in the conspiracy count for the purpose of supplying allegations of fact in the latter.[5]

---

[4] Indeed, there are some substantive offenses that are limited to a definite class of persons such as bankrupts, federal officials, etc. One not of such class can aid and abet another who is in the latter's commission of a substantive offense, and can thus be charged as a conspirator while lacking the capacity to commit the substantive offense itself.

[5] It is, however, a practice that does not have general approval. Where the conviction for conspiracy rests not upon the finding of an agreement, but upon the finding of combination or confederation implicit in concertive action in the commission of the substantive offenses, as in the case at bar, punishment upon the conspiracy count comes dangerously close to a second punishment for the same misdeeds. See the dissent in *Pinkerton v. U. S.*, 328 U.S. 640, and the cases and 1925 report of the Conference of the Senior Circuit Judges cited therein. See also the language of the Court in *Hamner v. U. S.*, 134 Fed. 2d 592, cited herein under appellant's first Assignment of Error.

The case at bar affords an excellent example.

The first paragraph of the substantive counts in itself charges conspiracy as conspiracy was defined by the instructions of the Court. The jury was instructed that this paragraph charges a joint scheme to defraud and the participation therein by each of the accused. They were then instructed that if they found the scheme existed, then each participant therein was liable for the substantive offense set forth in the second paragraph of each substantive count without regard to who might have done the actual mailing or made the particular sale described therein (Tr. pp. 1757 et seq.). It was only under the substantive counts that the jury

was instructed concerning the allegations of fact as they pertained to either count. The instruction upon the conspiracy count only defined the crime and did so substantially in terms of evidence of combination and confederation sufficient to support a conviction therefor. (There was no separate instruction as to appellant, for example, even though she was only charged in the conspiracy count. The guilt of one who participated in the joint scheme by knowingly and willfully assisting in the use of "existing corporations (such as the Davenport Corporation) to permit . . . one or more persons to siphon off money paid by the purchasers of membership . . ." was dealt with under the allegations of fact under the substantive counts: Tr. p. 1778.)

In *Pinkerton v. U. S.*, supra, conviction of the accused for the substantive offense was sustained upon the basis of evidence sufficient to support his conviction under the conspiracy count for conspiring to commit it. In the case at bar the same route was used to obtain the conviction of the accused upon the substantive counts with this important difference; it was a matter self-contained within the substantive counts themselves. While conviction under the substantive count in *Pinkerton v. U. S.*, supra, required a separate finding of ultimate fact, as it did in the case at bar, (that the accused was guilty of committing the substantive crime) in the converse situation in the case at bar conviction upon the conspiracy count required no further or different finding of ultimate fact than the substantive counts, either under the indictment or the instruction of the Court, because the finding that the accused had participated in a combination was a part of the substantive counts. A verdict of guilty of the conspiracy count was simply an affirmance that the accused had been found guilty of one or more substantive counts.

The foregoing is not all of the ill result in the case at bar. The evidence was conclusive that the defendant Errion was a swindler and that this was a fraudulent scheme by which he intended to benefit. Each of the accused had played a role in the venture. In the broad sense they had therefore participated in concert in a scheme whose ultimate object was fraud. Under the substantive counts the jury was instructed that an accused could be guilty thereof, and could have thus criminally participated in the scheme, if he made the alleged representations without regard to whether they were true or false, i.e., *without actual knowledge of their falsity and without acting in concert as to any other feature of the scheme* (Tr. pp. 1766-1779).

Upon this basis, and as such a participant, could not an accused be convicted of the conspiracy count because of participation in a joint scheme whose ultimate object was fraud, even though he had *no actual knowledge that his statements were false and therefore could not share that knowledge with others in common design?* (Tr. pp. 1778-1779). If conviction upon the conspiracy count is made to stand upon proof of an *agreement* whose sub-

stance was fraud and concerning which it had to be proven that each of the accused had participated therein with knowledge of that fraud shared with one another, the evidence was totally insufficient to support submission of the conspiracy count as to any but Errion and Munkers. These were the only two as to whom there was direct evidence of actual knowledge adduced from which an inference that it was shared between them with common design could be drawn. To the contrary, the Court instructed that belief that financing was assured for the project (the heart of Errion's fraud and the premise which destroyed the legitimacy of the venture, i.e., if there had been financing and the project had been financed, the project would have been as professed, but Errion would have made an improper profit upon the purchase of its plant site and there might or might not have been a claim against him for excessive organizational fees) would not exonerate an accused from liability of the substantive counts if they participated in the scheme "as outlined in Paragraph I," "if they knowingly and willfully made false promises or representations as to other matters." What other matters? It was not necessary, the Court instructed, that the Government prove all of the allegations with respect to the scheme or with respect to the alleged misrepresentations, "it is only necessary for the Government to prove sufficient fraudulent features *or* sufficient material representations to show that the scheme . . . existed" (Tr. p. 1775).

If a conspiracy indictment requires "a clear statement of the agreement which is proposed to be proven" (*Hamner v. U. S.*, 134 Fed. 2d 592, supra, at page 595) what is the agreement in the case at bar? Who could be made acquainted with the agreement against which he was to defend from this indictment when there were as many possible combinations and permutations for guilt of the substantive counts as set forth in the instructions and guilt of the conspiracy count was in itself a matter of further possible permutations and combinations? If the instructions of the trial court were a correct interpretation of the indictment, it is doubtful if a crime could be any more esoteric than the "conspiracy" charged here. Certainly no lay person could make an analysis of this indictment equal in breadth and scope to that of the trial court—and very few counsel. More than that, if crime can be so complex, who, ahead of time, could make a similar and continuing analysis of a business venture in which he was associated with others so as to ascertain whether or not federal criminal prosecution did not lurk therein?

What possible distinction can there be between the conspiracy count and the substantive counts in this cause when appellant, who was only charged in the former, could be dealt with complete facility in the instructions concerning the latter? Were it not for the more overriding premise illustrated by this fact, that the indictment fails to state a crime against her and that she was convicted upon no personal guilt, but solely for the crimes charged against her co-defendants, appellant would urge duplicitness of the indictment as an assignment of error.

All these rules are correct as matters of procedure. They do not, however, in appellant's opinion, obviate the basic substantive rules that an accused is entitled to be informed of the crime of which he is accused in allegations of fact and that no one can be held responsible for the conduct of others except by allegations permitting prior proof of a relationship creating such responsibility. It would seem that if the desire is to join a series of substantive counts with a conspiracy count and to name an accused in the conspiracy count who is not named in the substantive counts, then care must be taken to charge such an accused in the conspiracy count with the substance of his own alleged agreement and in terms embracing his personal adoption of the acts of his co-defendants set forth in the substantive counts.

Had the Court granted appellant's motion for a separate trial, the fallacies of indictment and proof hereinabove outlined would have been made apparent.

Assuming, as one is entitled to assume, that the evidence adduced in a criminal cause relates only to the allegations of fact set forth in the indictment, none of the evidence in this cause relates to appellant. This evidence now occupies a Transcript of Testimony of some 1800 pages. The cause took three weeks to try and there were seven defendants. The offenses charged were a joint scheme and conspiracy, not simple matters in themselves.

A narrative account of the evidence cannot help but be involved and lengthy. The defendant Errion is the

principal figure throughout. It is actually he of whom the indictment speaks when it charges control of the Davenport Corporation, the execution of a contract in its name and the wrongful receipt of moneys through its use. But a very small portion of the evidence, however, touches upon his use of the corporation, and thus of appellant, as charged. However, a narrative account is not only of interest but of importance, in that it can be seen that in fact the evidence itself has no more to say about appellant than do the allegations of fact of the indictment. At the close of the prosecution's case, the evidence "against" appellant was literally the testimony of witnesses for the prosecution (specifically Bobbitt, Samuels and Piatt) that Errion was the recognized organizer and promotor of the cooperative and that this contract naming the Davenport Corporation was the contract by which he was to be compensated for his services. He directed its preparation by counsel (Bobbitt) and its execution by officers of the cooperative and appellant (Samuels). Pursuant to its terms he directed the purchase of the cooperative's plant site (Banks) and its resale to the cooperative at a profit to himself. All of the moneys specified in the indictment as wrongfully obtained were traced to Errion. In most instances the money was delivered to him personally although in the form of checks payable to the Davenport Corporation (Samuels). There was a checking account in the name of this corporation which was in fact Errion's (Piatt); the money deposited therein was his and withdrawals were at his direction (Piatt). Those witnesses testifying to the execution of the contract (Bobbitt) and

to the payment of the cooperative's money to Errion (Samuels), testified that they had never dealt with appellant, had never had contact with her and had never delivered any moneys to her. They had a full understanding that they were dealing with Errion and that Errion was dealing upon his own behalf. Appellant had simply not been involved in their transactions with him.

Pursuant to the foregoing, at the close of the Government's case, there was a complete void as to appellant. She was president of the Davenport Corporation and her signature was hers wherever it appeared. Whether or not she had had knowledge of the course that Errion was actually pursuing was a matter of sheer conjecture except in so far as it had been proven to the contrary; that hers was apparently a purely mechanical role, which required no such knowledge and from which no such knowledge need necessarily be inferred. (Precisely the conclusion of a Grand Jury that would lead to her omission from the substantive counts.) As a case for the defense, all that was lacking was appellant's personal protestation of innocence.

This had to await appellants' testimony in her own defense. She corroborated that her role was in fact mechanical and that she had been induced to play it, at no profit to herself, by representations of Errion similar to those by which he had induced the participation of other witnesses for the prosecution. She had been similarly deceived and had had no more knowledge of his actual intent.

Why did the Government seek to censure her through

the conspiracy count? Because of the enormity of Errion's crime; for associating with the man; for what she should have known about him and not what she actually knew about his scheme. This depended upon her previous contact with him and likewise had to await her own testimony. It was simply that she had been gulled by him before.

As to this, appellant's age and sex are as much facts as any other facts to be weighed. This is not a matter of sympathy or chivalry towards a woman in her eighties, but that experience has shown that elderly women are the usual targets of persons of charm and guile; they are more easily imposed upon. On the other hand, elderly women whose mental faculties have not only escaped the ravages of time, but have become sharpened in old age towards evil purpose, do not really exist. To have been a conspirator in this cause, as the law in fact defines a conspirator, appellant must be pictured as such a one, acting out of pure malice, for no gain to herself and simply for the pleasure of seeing a large number of persons swindled out their money by Robert Errion. This is not a rational speculation.

Appellant's first three Assignments of Error treat respectively with the failure of the indictment to state a crime against her, the irrelevancy of the evidence adduced to any issue of her guilt or innocence of any crime because of the limitations imposed thereupon by the allegations under which it was adduced (as Assignment of Error I-A) and the failure of the Court to grant her motion for a separate trial. These Assignments of Error require no narrative of the facts. For this

reason, as well as spacial limitations, such a narrative account is attached to this brief as an appendix. However, for full understanding, the reader may wish to consider it at this point and it is necessary for an understanding of appellant's fourth and fifth Assignments of Error.

## ASSIGNMENT OF ERROR NO. I

The indictment fails to state facts sufficient to charge appellant with a crime.

### POINTS AND AUTHORITIES

I.

A conspiracy count must set forth in allegations of fact, the agreement with which the accused is charged. His agreement is the crime of which he is accused and he is entitled to be informed of his crime so as to enable him to make his defense thereto. At the same time these allegations are necessary to enable the Court to ascertain that the crime of conspiracy has been properly charged in that the agreement alleged would in fact result in a violation of a substantive statute when carried into effect, and that agreements to violate that substantive statute are penalized by the conspiracy statute under which the charge has been brought.

Hamner v. U. S., 134 Fed. 2d 592.
Asgill v. U. S., 60 Fed. 2d 780.
U. S. v. Cruikshank, 92 U.S. 542, 23 Law Ed. 588.
Pettibone v. U.S., 148 U.S. 197, 13 Sup. Ct. 542, 37 Law Ed. 419.
State v. Van Pelt, 136 N.C. 633, 49 S.E. 177, 188, 68 L.R.A. 760, 1 Annotated Cases 495.

II.

In construing whether or not a conspiracy count contains factual allegations of the substance, object and purpose of the agreement with which the accused is charged, adequate for the foregoing purposes, the allegations of fact purporting to set forth the same will not be aided by the allegations of overt acts or the allegations of the acts of alleged co-conspirators. An overt act is not a necessary ingredient of the crime itself, but merely affords the point in time when the conspiracy agreement was carried into effect and prior to which any of the alleged co-conspirators could have withdrawn from the same, while until the accused's conspiracy agreement is properly alleged and proven as embracing the acts alleged upon the part of his alleged co-conspirators, he is not responsible for such acts and their performance is not admissible against him.

U. S. v. Amister, 273 Fed. 532.
U. S. v. Britton, 198 U.S. 199, 2 Sup. Ct. 31, 27 Law Ed. 698.
U. S. v. Beiner, 275 Fed. 704.
Hamner v. U. S., 134 Fed. 2d 592.

IV.

Nor, in considering the matter, will mere legal conclusions be accepted in the place of factual allegations.

U. S. v. Cruikshank, 92 U.S. 542, 23 Law Ed. 588.
Pettibone v. U. S., 148 U.S. 197, 13 Sup. Ct. 542, 37 Law Ed. 419.

## Summary of Argument

Criminal conspiracy is truly a statutory crime. It is an agreement whose object is the performance of an unlawful act or the accomplishment of a lawful end by unlawful means where substantive statutes exist denouncing particular ends or means as unlawful and a further and separate statute exists that designates those substantive statutes and provides a penalty for those who enter into an agreement to violate them.

If the activity contemplated by the parties in their agreement, or performed by them pursuant thereto, would not, in the first instance, or does not, in the second, violate a substantive statute then there is nothing in such an agreement pertinent to either a substantive offense or to a conspiracy statute that has reference only to substantive offenses. It also follows that even though the activity contemplated or performed under the terms of the agreement may in fact constitute a substantive offense, an indictment for conspiracy cannot be lodged unless there is a statute permitting the same, i.e., one that imposes a penalty upon those who enter into an agreement to accomplish that particular substantive offense.

The accused's agreement to violate a substantive statute being his crime, the only fashion in which the crime can properly be charged is by citing a substantive statute and setting forth in allegations of fact the substance of the accused's agreement in terms of the conduct contemplated or performed thereby violative of that statute. The accused is always entitled to be made

acquainted with the crime with which he is charged so as to enable him to make his defense thereto, and conspiracy is no exception. Likewise the court must be able to ascertain that the indictment charges a crime in that the conspiracy statute under which the indictment has been brought penalizes agreements to violate the substantive statute to which the indictment refers and that the agreement alleged is in fact one to violate that substantive statute.

In the case at bar the conspiracy count makes no pretense of adequate allegations of fact of the substance of the agreement of the alleged co-conspirators. In itself it contains only conclusions of law, charging that the defendants agreed and conspired to violate particular substantive statutes. To ascertain the substance of the alleged agreement among the co-conspirators and to ascertain whether or not this agreement was in fact violative of these statutes, the court must turn to the substantive counts which are incorporated by reference into the conspiracy count for that purpose. To ascertain the crime with which they have been charged so as to enable them to make their defense thereto, the accused must do the same.

The substantive counts, however, are all charged as the joint acts of appellant's alleged co-conspirators alone. Indeed, in the conspiracy count itself they are charged as overt acts upon their part in furtherance of the alleged conspiracy of the whole. Obviously, when the substantive counts are so charged, no proof in support of them (or of the agreement supposedly embraced within them) is admissible against appellant

until a conspiracy agreement is first proven against her that includes within its terms an agreement to such actions upon the part of her co-defendants. Until that time, she is not responsible for those acts. Thus, the rule is that when testing whether or not a conspiracy count sufficiently alleges the substance of the agreement of the particular accused, allegations of the overt acts committed by alleged co-conspirators, as well as overt acts in general and legal conclusions, will not be considered. As a practical matter, it is of no avail to do so.

Thus, in testing the sufficiency of the conspiracy count in the cause at bar, the incorporation by reference of the substantive counts into the conspiracy count serves no purpose as to appellant and is to be disregarded. As a result, the conspiracy count contains only a conclusion of law as to her. Specifically, there are no allegations therein upon which there can be based proof, independent of proof of the substantive counts, of a purported conspiracy agreement upon appellant's part; in particular proof of her agreement to the commission of those substantive offenses by her alleged co-conspirators.

## ARGUMENT

A conspiracy count must distinctly and directly allege the agreement with which the accused is charged.

It is stated in *Asgill v. U. S.*, 60 Fed. 2d 780 at page 785:

> "When the charge is laid, however, the terms of the agreement must be set forth therein, and, until this is done, evidence of the conduct of the parties cannot be held competent or responsive to the unalleged agreement."

In greater detail, it is stated in *Hamner v. U. S.*, 134 Fed. 2d 592 at page 595:

> "Now the gist of the charge of conspiracy is the agreement to commit an offense or a fraud against the United States. An overt act must be done pursuant to the agreement before . . . the crime is complete, but its essence lies in the agreement. That agreement must be distinctly and directly alleged. Inference and implication will not, on demurrer, suffice. Aid cannot be sought in the allegations of what was done in pursuance of it . . ."
>
> . . .
>
> "What was done is often good evidence of what was agreed to be done, but to allege such evidence is not an allowable substitute for a clear statement of the agreement which is proposed to be proven. Such a pleading invites the abuse of the conspiracy statute which has often happened by stating several substantive joint offenses and seeking conviction not only for them but for a conspiracy as well. Such a thing is legally possible, but it emphasizes the necessity for clear-pleading of the conspiracy agreement as a thing to be proved separate and distinct from the substantive crimes."

Appellant need hardly point out that the last paragraph above cited is a precise description of the case at bar. The indictment charges a series of crimes and the conspiracy count has been patently added to crown the whole with a conviction for conspiracy based upon them. In the meantime, appellant is not even charged in any of these substantive counts and the need, as to her, of a clear statement of the conspiracy agreement of which she is accused, as against the substantive offenses of which she is not, becomes imperative.

In particular, where the charge is conspiracy to defraud, the allegations of the agreement must include

a factual description of the scheme to defraud. Only this will enable the court to ascertain that it is such a fraud as is contemplated by the conspiracy statute under which the charge is brought and the accused to defend upon the particular basis that one or more of such allegations of fact are untrue and that he did not in fact enter into an agreement to commit the substantive offense contemplated by the conspiracy statute under which the charge is brought.

It is stated in *U. S. v. Cruikshank,* 92 U.S. 542 (at page 558), 23 Law Ed. 533:

> ". . . the object of the indictment is, first, to furnish the accused with such a description of the charge against him as will enable him to make his defense, and avail himself of his conviction or acquittal for protection against a further prosecution for the same cause; and, second, to inform the court of the facts alleged, so that it may decide whether they are sufficient in law to support a conviction, if one should be had. For this, facts are to be stated, not conclusions of law alone. A crime is made of acts and intent; and these must be set forth in the indictment, with reasonable particularity of time, place and circumstances . . .
>
> " . . . it is in some States a crime for two or more persons to conspire to cheat or defraud another out of his property; but it has been held that an indictment for such offense must contain allegations setting forth the means proposed to be used to accomplish the purpose. This, because, to make such a purpose criminal, the conspiracy must be to cheat or defraud in the mode made criminal by the statute;"

In *Pettibone v. U. S.,* 148 U.S. 197, 13 Sup. Ct. 542, 37 Law Ed. 419, it is stated (in 148 U.S. 197 at page 203):

" . . . when the criminality of a conspiracy consists of an unlawful agreement of two or more persons to compass or promote some criminal or illegal purpose, that purpose must be fully and clearly stated in the indictment; while if the criminality of the offense consists in the agreement to accomplish a purpose not in itself criminal or unlawful, by criminal or unlawful means, the means must be set out.

"This indictment does not in terms aver that it was the purpose of the conspiracy to violate the injunction referred to, or to impede or obstruct the due administration of justice in the Circuit Court; but it states, as a legal conclusion from the previous allegations, that the defendants conspired so to obstruct and impede . . ."

As can be seen from *Hamner v. U. S.,* supra, the allegations of overt acts will not be used to aid the allegations of the agreement. Nor are the allegations of the acts of alleged co-conspirators available for that purpose. It is stated in *U. S. v. Britton,* 108 U.S. 199 (at page 204), 2 Sup. Ct. 531, 27 Law Ed. 698:

"The offense charged in the counts of this indictment is a conspiracy. This offense does not consist of both the conspiracy and the acts done to effect the object of the conspiracy, but of the conspiracy alone. The provisions of the statute, that there must be an act done to effect the object of the conspiracy, merely affords a *locus penitentiae* so that before the acts done either one or all of the parties may abandon their design and thus avoid the penalty prescribed by the statute. It follows as a rule of criminal pleading that in an indictment for conspiracy under Section 5440, the conspiracy must be sufficiently charged, and that it cannot be aided by the averments of acts done by one or more of the conspirators in furtherance of the object of the conspiracy."

The logic of this rule is apparent. A conspirator is responsible for the acts of his co-conspirators in which he did not directly participate, but he cannot be made responsible for them until his conspiracy agreement is first proven to embrace them. As stated in *U. S. v. Beiner,* 275 Fed. 704 at page 706:

> "There is a foundation in reason for such rule, because, after a conspiracy is formed, an overt act may be committed by one or more of the conspirators without the knowledge of the others."

And finally, as can be seen from *U. S. v. Cruikshank,* supra, and *Pettibone v. U. S.,* supra, in the pleading of the object-purpose of the accused's agreement, legal conclusions will not be accepted as a substitute for factual allegations.

The allegations of the indictment in the case at bar are as follows:

Count I charges that the defendants Errion, Munkers, Wright, Bones, Locke, Montgomery and Martin:

> ". . . devised and intended to devise a scheme and artifice to defraud and for obtaining money and property from purchasers of memberships in Mt. Hood Hardboard and Plywood Cooperative, hereinafter called 'purchasers,' by means of false and fraudulent pretenses, representations, and promises, well knowing at the time that the pretenses, representations, and promises would be false when made.";

there then following a detailed description of the scheme, artifice and representations of the above named defendants.

The conspiracy count charges that these defendants and appellant:

". . . did conspire, combine, confederate, and agree with each other to commit the following crimes and offenses against the United States:

"Violations of Section 1341, Title 18 U.S.C., by using, and intending to use, the mails of the United States for the purpose of executing the scheme and artifice to defraud and to take the money and property from purchasers of memberships in the Mt. Hood Hardboard and Plywood Cooperative, as described in the first count of this indictment, which is here and now re-alleged and incorporated by reference;"

that scheme, artifice and intent "as described in the first count" being the joint scheme, artifice and intent of appellant's co-defendants.

The indictment continues:

"Violations of Section 77q(a), Title 15, U.S.C., by employing said scheme and artifice to defraud, obtaining money and property by means of untrue statements and omissions to state material facts necessary in order to make the statements true, in the light of the circumstances under which they were made, not misleading, and engaging in transactions, practices and courses of business which would and did operate as a fraud and deceit upon purchasers in the sale of memberships in Mt. Hood Hardboard and Plywood Cooperative by the use of the United States mails, all as described in the preceding counts of this indictment and hereby incorporated by reference;"

that scheme, artifice, intent and those representations, again being described in the first count as the scheme, artifice, intent, and representations of appellant's co-defendants.

The conspiracy count then continues:

"Each and all of said acts of the defendants as described in Counts I through XII, inclusive, of

this indictment are here and now re-alleged and incorporated herein and designated as overt acts done by the said defendants in pursuance of said conspiracy and to effect the objects thereof, the defendants performed additional overt acts, including, among other, the following, to-wit:

There then follows a series of overt acts, the following of which contain appellant's name:

"7. On or about October 1, 1954 at Portland, Oregon, defendant Helen A. Davenport signed a contract as President of the Davenport Corporation with Mt. Hood Hardboard and Plywood Cooperative providing for payment of a fee to the Davenport Corporation of ten per cent of the total amount received from the sale of memberships in Mt. Hood Hardboard and Plywood Cooperative . . .

"12. On or about December 7, 1954 at Portland, Oregon, defendant Edgar Robert Errion obtained a check from Mt. Hood Hardboard and Plywood Cooperative payable to the Davenport Corporation in the amount of $8,000.00, and transmitted said check to defendant Helen A. Davenport.

"13. On or about November 27, 1954 at Portland, Oregon, defendant Edgar Robert Errion obtained the check from Mt. Hood Hardboard and Plywood Cooperative payable to the Davenport Corporation in the amount of $8,000.00, and transmitted said check to defendant Helen A. Davenport.

"14. On or about January 13, 1955, at Portland, Oregon, defendant Edgar Robert Errion obtained a check from Mt. Hood Hardboard and Plywood Cooperative payable to the Davenport Corporation in the amount of $3,000.00 and transmitted said check to defendant Helen A. Davenport."

The foregoing allegations are *not* allegations of overt acts upon the part of appellant. They refer to the following allegations of Count I of the indictment:

> "As a further part of said scheme and artifice, said defendants would and did cause said Mt. Hood to enter into a contract with the Davenport Corporation, a corporation controlled by defendants, by means of which said Davenport Corporation would and did claim and receive and convert to the use and benefit of defendants, a large portion of the monies which had been received from said purchasers of Mt. Hood memberships;"

After accusing appellant of having conspired with her co-defendants to violate Section 134, Title 18, and Section 77q(a), Title 15, as a bare conclusion of law, the indictment *has not one single word further to say about her.* The substance of her agreement, the allegations by which it must be determined whether or not she had agreed to do such a thing as in fact violated those sections, must be drawn from the substantive counts. The substantive counts are upon their face not only solely the substantive offenses of her co-defendants, but are directly alleged in the conspiracy count to be overt acts upon their part in furtherance of the conspiracy of all.

Appellant was charged with nothing and tried for nothing. It is patent upon the face of the indictment that the only proof that was intended to be presented under it of the existence of a conspiracy agreement, or of the terms thereof, or of the parties thereto, (who, by being parties to it brought it into the existence sought to be established), is what is alleged in the substantive counts as having been done by those charged therein.

The indictment charges conspiracy against no one other than those defendants.

## ASSIGNMENT OF ERROR NO. I-A

The indictment fails to state facts sufficient to charge appellant with a crime in that the evidence that could be adduced thereunder was necessarily irrelevant to any question of appellant's guilt or innocence of any crime because of the limitations of proof imposed by its allegations.

### POINTS AND AUTHORITIES

I.

The allegations of fact set forth in the indictment, and facts tending to prove those facts, are the facts in issue in a criminal cause.

Rule 7(c), Federal Rules of Criminal Procedure.
42 C.J.S., Indictment and Information, Sec. 244, page 1262; Sec. 253, page 1269.

II.

Evidence is relevant and admissible only if it relates to the fact in issue. All other evidence is irrelevant and inadmissible.

Wood v. U. S., 41 U.S. 342, 16 Pet. 342; 10 Law Ed. 987.
Weinstock v. U. S., 231 Fed. 2d 699; 97 U.S. App. D.C. 365.

III.

Evidence of the acts of alleged co-conspirators are not admissible against an accused until a conspiracy agreement is first proven upon his part that in its terms embraces such acts.

U. S. v. Beiner, 275 Fed. 704.

IV.

A conspiracy is a partnership in crime. Each conspirator agrees to join in the criminal venture and each by his agreement becomes an equal participant in the acts constituting the substantive offenses. By definition participation in a substantive offense is the subject matter of the conspiracy agreement.

Marino v. U. S., 91 Fed. 2d 691.
U. S. v. Delaro, 99 Fed. 2d 781.
U. S. v. Corlin, 44 Fed. Supp. 940.
Pinkerton v. U. S., 328 U.S. 640; 66 Sup. Ct. 1180, 90 Law Ed. 1489; Rehearing denied, 329 U.S. 818; 67 Sup. Ct. 26, 91 Law Ed. 697.
Curley v. U. S., 160 Fed 2d 229.

V.

This is so to the end that where a conspiracy count based upon incorporation of the allegations of substantive counts is joined with the substantive counts, failure of the substantive counts to charge a crime renders the conspiracy count fatally defective; and a verdict of not guilty of the substantive count, but guilty of the conspiracy count, is an inconsistent verdict. In like fashion, a prior trial and acquittal upon a conspiracy indictment bars a subsequent indictment and trial for the substantive offense alleged to have been the object of the conspiracy, as res judicata of the facts.

Spear v. U. S., 228 Fed. 485.
Boyle v. U. S., (8th Circuit) 22 Fed. 2d 547.
Ross v. U. S., 197 Fed. 2d 660.
Steckler v. U. S., 2d Circuit, 7 Fed. 2d 59, 60.
Dunn v. U. S., 284 U.S. 390.
Sealfon v. U. S., 332 U.S. 575, 68 Sup. Ct. 237, 92 Law Ed. 180.
Cosgrove v. U. S., 224 Fed. 2d 146.

VI.

It is impossible to adduce evidence that an accused has participated in a conspiracy agreement where (1) he is charged with a crime only in a conspiracy count of an indictment that joins substantive counts with a conspiracy count and (2) the conspiracy count contains no independent allegations of fact but only incorporates by reference those set forth in the substantive counts. Proof of his participation in the substantive offenses is immaterial and irrelevant to proof of those counts and there are no separate allegations of fact in the conspiracy count to permit proof that he is guilty of that count.

Boyle v. U. S., 22 Fed. 2d 547.
Cosgrove v. U. S., 224 Fed. 2d 146.

## Summary of Argument

It was impossible to adduce evidence that appellant had participated in any conspiracy agreement. The only allegations of fact contained in the indictment are those set forth in the substantive counts. Proof of her participation in the substantive offenses was immaterial and irrelevant to proof of the substantive counts.

There being no other allegations of fact in the indictment, no evidence could be adduced concerning appellant in the cause.

## ARGUMENT

This cause is based solely upon the allegations of fact set forth in the substantive counts, as such, and incorporated into the conspiracy count.

The most that can be said of the evidence adduced under these allegations is that it was sufficient to prove them. This evidence cannot concern appellant since these allegations contain no issue of fact concerning her.

Further, the substantive counts are alleged to be the joint acts of appellant's co-defendants and in particular, overt acts upon their part. Thus, the allegations of the substantive counts not only put no facts in issue as to appellant, but the facts they do put in issue are the overt acts of her co-defendants. In no event is the proof of these relevant as to appellant except upon prior allegations and proof of an agreement upon her part in which she embraces the crimes of her co-defendants and by which she becomes responsible therefor (*U. S. v. Beiner,* 275 Fed. 704).

This issue is completely outside the allegations of fact of the indictment. Therefore, proof thereof is completely outside the proof in support of these allegations (*Wood v. U. S.,* 41 U.S. 342, 10 Law Ed. 987).

The only interpretation that can be placed upon the evidence adduced in this cause is that it supports the allegations of fact set forth in the substantive counts. No sooner is something of further significance claimed for a particular item than the thought must be dismissed. Evidence is relevant only if it relates to facts in issue (*Wood v. U. S.,* supra). Facts in issue are the facts alleged by the indictment and such facts as tend to prove those facts (42 C.J.S., Indictment and Information, Sec. 244, p. 1262). A further significance would be irrelevant to the facts in issue and, as such, impossible of consideration.

There can be no contention that the evidence that touched upon appellant was adduced for the two purposes of substantiating the allegations of fact of the substantive counts against appellant's co-defendants and of permitting the jury to pass upon appellant's guilt or innocence of "conspiracy." One need only repeat that evidence was admissible in this cause only upon the ground that it was relevant and material to the allegations of fact set forth in the indictment. By definition, as "relevant and material" evidence, it has no other probative value. That it serves the purpose of supporting those allegations of fact precludes it from having any further significance. Conversely, if it is not relevant or material to these allegations of fact, it was wrongfully admitted.

The apparent theory upon which appellant was arrested and hailed into court is that if a group of persons are properly alleged and proven to have committed a joint offense and to have entered into a conspiracy agreement to do so, then as incident thereto, the jury can pass upon the guilt or innocence as a "conspirator" of any person shown by the proof of such allegations to have been involved by them in their scheme. The indictment envisions a class of persons who are not guilty of the substantive offenses, but who, on the other hand, are not completely innocent of having been touched by the affair, either; a class of persons who can be convicted upon the basis of being thus half-innocent and half-guilty, who are to be called "conspirators" and whose censure does not depend upon allegations and proof as does the guilt of the real con-

spirators, but is solely a matter of discretion upon the part of the jury.

There is no such thing.

In a case such as the one at bar where the substantive counts charge executed crimes and there are no disabilities barring prosecution of the accused for those crimes and the conspiracy count is based solely upon the accused's participation therein, a conspirator is first of all one who by his deeds has made himself subject to punishment under the substantive statute as a party to a violation thereof.

It is stated in *Pinkerton v. U. S.,* 328 U.S. 640; 66 Sup. Ct. 1180, 40 Law Ed. 1489; rehearing denied, 329 U.S. 818; 67 Sup. Ct. 26, 91 Law Ed. 697; (In upholding the conviction of a conspirator upon a substantive count as to which there was no evidence of his guilt other than proof of his conspiracy agreement and of the commission of the substantive offense by his co-conspirator); at 328 U.S. 640 at page 647:

> "The criminal intent to do the act is established by the formation of the conspiracy. Each conspirator instigated the commission of the crime . . . The rule that holds responsible one who counsels, procures, or commands another to commit a crime is founded on the same principle. The principle is recognized in the law of conspiracy when the overt act of one partner in crime is attributable to all . . . If that can be supplied by the act of one conspirator, we fail to see why the same or other acts in furtherance of the conspiracy are likewise not attributable to the others for the purpose of holding them responsible for the substantive offense."

This statement is summed up in *Curley v. U. S.*, 160 Fed. 2d 229 at page 237 as follows:

> ". . . and that each participant in a conspiracy is liable upon substantive counts for all acts committed by another conspirator pursuant to the conspiracy, are settled by *Pinkerton v. U. S.* (1946), 328 U.S. 640; 66 Sup. Ct. 1180."

Under an indictment such as this, a "conspirator", therefore, is a party to a crime who is a "conspirator" because a statute says that he can be punished for his agreement to commit the crime over and above the punshiment that can be imposed upon him for committing the crime itself.

It is patent, for example, that under an indictment drawn as the one in the case at bar, where the allegations of the conspiracy count are merely a repetition by incorporation of the allegations of the substantive counts, that the facts to be proven to support conviction of both counts are necessarily as synonymous as the incorporation by reference purports them to be. Guilt of the conspiracy count is only a matter of a different (or additional) inference drawn from the same set of facts.

That this is the actual state of the matter can be seen from those cases in which an accused has been acquitted of one or the other of the counts, but found guilty of the other, under like indictments as the one in the case at bar.

Such a verdict is uniformly held to be inconsistent. The courts are divided as to whether or not such inconsistency voids the conviction upon the one count, but

all agree upon the inconsistency itself. Where such convictions have been upheld, the reason given has been essentially that the inconsistency is the result of an act of leniency upon the part of the jury in favor of the accused. Where such convictions have been reversed, the reason given has been essentially that the acquittal removed from the cause all facts relevant to the allegations of counts upon which there has been acquittal and there being no separate allegations in the other count under which that count could be separately proven, the verdict must be set aside.

It is stated in *Boyle v. U. S.,* (8th Circuit) 22 Fed. 2d 547 at page 548, in reversing a conviction of the accused for "knowingly" maintaining a nuisance because the jury had acquitted them upon a count of conspiracy to maintain the same:

> "There exists a diversity of opinion among the various federal courts as to the effect of an inconsistent verdict, where there are different counts in an indictment. On the one hand, it has been held that, where a jury convicts upon one count and acquits upon another, the conviction will stand, though there is no rational way to reconcile the two conflicting conclusions. Such is apparently the holding in the second, sixth and seventh circuits (citing authority) . . .
>
> "On the other hand, it has been held under similar circumstances that the conviction will not be allowed to stand, unless the verdict is supported by evidence other than the facts pleaded in support of the counts upon which acquittal has been had. This is the view adopted in this circuit and apparently in the third. (citing authority)."

In *Ross v. U. S.,* 197 Fed. 2d 660, such a conviction

was upheld, the Court stating upon page 662 (citing the language of *Steckler v. U. S.,* 2d Circuit, 7 Fed. 2d 59, 60):

> "The most that can be said in such cases is that the verdict shows that either in the acquittal or conviction the jury did not speak their real conclusions, but that does not show that they were not convinced of the defendant's guilt. We interpret the acquittal as no more than their assumption of a power which they have no right to exercise, but to which they were disposed through lenity."

In *Dunn v. U. S.,* 384 U. S. 390, the same ruling obtained, the Court again citing the language of *Steckler v. U.S.,* supra.

On the other hand the same subject has been under discussion where there has been a trial and acquittal for conspiracy followed by a subsequent indictment for the substantive offense. Here, where the verdict of a jury is not involved, the courts have uniformly recognized the identical factual basis for the two charges by holding that the second indictment must be dismissed because the prior trial and acquittal has been res judicata as to the facts.

In *Sealfon v. U. S.,* 332 U. S. 575, 68 Sup. Ct. 237, 92 Law Ed. 180, this circumstance was before the Court. The accused had been acquitted of conspiracy with one Greenberg to submit a fraudulent claim, and was then charged with the substantive offense of aiding and abetting Greenberg to submit the claim. In 332 U.S. 575 at page 579 the Court states:

> "Petitioner was the only one on trial under the conspiracy indictment. There was no evidence to con-

nect him directly with anyone other than Greenberg. Only if an agreement with at least Greenberg was inferred by the jury could petitioner be convicted . . . the jury was told petitioner must be acquitted if there was reasonable doubt that he conspired with Greenberg . . . Viewed in this setting the verdict is a determination that petitioner, who concededly wrote and sent the letter, did not do so pursuant to an agreement with Greenberg to defraud.

"So interpreted, the earlier verdict precludes a later conviction of the substantive offense. The basic facts in each trial were identical . . . petitioner could be convicted of either offense only on proof that he wrote the letter pursuant to an agreement with Greenberg. Under the evidence introduced, petitioner could have aided and abetted Greenberg in no other way . . ."

The subsequent indictment was dismissed.

The same question was before this Court in *Cosgrove v. U. S.*, 224 Fed. 2d 146. Here this Court held an acquittal of conspiracy with officers of the Internal Revenue Department to submit fraudulent estate tax returns was res judicata as to the facts of a subsequent indictment for aiding and abetting those officers to submit fraudulent estate tax returns and barred the subseqent indictment. Syllabus 5 states:

"Defendant's acquittal of conspiracy, with officer of Department of Internal Revenue, to defraud the United States in respect to several estate tax returns and of covering up a material fact in an estate tax return, was re judicata as to charges that defendant had, by agreement with officer, wilfully aided and assisted in, procured, counseled and advised the preparation and presentation of false and fraudulent estate tax returns."

Upon page 151, this Court states:

> "The close relationship between conspiracy and aiding and abetting was clearly recognized by the Supreme Court in *Pinkerton v. U. S.* . . ."

The Court then proceeds to offer other illustrations of this point.[6]

In the case at bar the substantive counts are meant to put in issue the facts from which an inference of the commission of the crime of conspiracy could be drawn. They put no facts in issue as to appellant, and the indictment puts no other facts in issue.

If under an indictment such as this a verdict of guilty of the conspiracy count would be inconsistent with a verdict of acquittal upon the substantive counts, appellant's conviction of the conspiracy count without any preceding issue of fact whatsoever concerning her in the substantive counts, is obviously inconsistent to the point of an impossibility.

If a trial and acquittal upon a conspiracy charge can bar a subsequent indictment and trial upon the substantive offense alleged in the conspiracy indictment to have been the object of the conspiracy, because the two can be factually identical, it is obvious that they *must* be factually identical in an indictment wherein the conspiracy count is joined with the substantive counts and is based upon the latter's allegations by

---

[6] For a further illustration of the factual identity of the two counts under such an indictment as here see *Spear v. U. S.*, 228 Fed. 485. Upon page 486 the Court states:

> "At the threshhold of the cases is the question of the sufficiency of the counts for fraudulent use of the mails. If they fall, that for conspiracy depending upon them falls also."

their incorporation. In such an indictment there can be no issue of fact concerning an accused charged only in the conspiracy count. The only allegations raising issues of fact are in the substantive counts and the accused is not charged therein. He has not been charged with the facts of the crime.

One recalls the words of the Court in *Boyle v. U. S.*, supra: That the conviction will not be allowed to stand "unless the verdict is supported by evidence other than the facts pleaded in support of the counts upon which the acquittal has been had." A conviction cannot be allowed to stand where the only facts pleaded are those in support of counts that omit the accused and the verdict must be supported by facts other than those alleged in support of those counts—of which there are none.

The most vigorous apology which can be made for the fashion in which this indictment treats of appellant can only amount to a contention that the substantive counts beg the question as to whether or not she knowingly participated in them, leaving the matter open in so far as the conspiracy count is concerned. This contention refutes itself. As the allegations beg the question, so must any proof of which it is to be said: "This evidence proves these allegations."

* * *

None of the propositions appellant has advanced in these first two Assignments of Error are mere abstract propositions of law. They had a practical effect so devastatingly unjust that it is patent that no one was aware of it.

Just as appellant was without a charge, so was she without a defense; just as her guilt was not in issue, neither was her innocence.

The defense of her co-defendants was clear. They could defend against the allegations of the substantive counts and it followed that if innocent of those counts they were innocent of the conspiracy count. What manner of defense was it for appellant to assert that she was innocent of the substantive counts when she was not charged with having committed them?

The indictment is clear. Appellant is not accused in the substantive counts. The jury was not to be concerned with whether she was or was not guilty of those counts; that was not an issue submitted to them. The indictment assumes that as a matter of law, not only is her actual innocence of the acts charged against her co-defendants immaterial to her conviction under the conspiracy count, assuming that she was innocent of their crimes and was omitted from the substantive count because of such innocence, but that even the very question of whether she is guilty *or* innocent of the substantive offenses is immaterial to her conviction for "conspiracy" to commit them.

But that is not the end of the matter. Not only did the indictment render immaterial to her conviction her innocence of the acts charged against her co-defendants from which *their* guilt of the conspiracy was to be inferred, but as one might surmise, appellant was affirmatively exonerated of any criminal complicity in those acts by the prosecution's case in chief. She was literally

robbed of a defense, if she needed any, by the prosecution proving her innocent of the substantive counts before she had a chance to prove herself innocent thereof so as to free herself of the conspiracy count if, despite the failure of the indictment to charge her with the substantive counts, the conspiracy count nonetheless charged her therewith in some fashion.

When the indictment alleges that Errion, Munkers, Locke, Bones, Montgomery, Wright and Martin caused the Davenport Corporation to execute a contract for the promotion of the cooperative, the reverse side of the coin is that appellant did not, even though the contract was executed in the name of the corporation by her signature as its president. There is not even room for speculation after one reads the testimony of the witnesses Bobbitt and Samuels and the defendant Williams.

When the prosecution finished proving through the witnesses Piatt and Samuels that the monies that went to the Davenport Corporation went into Errion's pocket and not appellant's, even though she was president and principal stockholder of this corporation, what remained for appellant to say about these monies?

These are not merely the facts; *these were the facts proven by the prosecution in its case in chief.* Proof of one's innocence is not proof of one's guilt, even when one is charged with "conspiracy."

One may read this record, but can anyone charge appellant with an intent to mislead if she asserts that it follows the allegations of the indictment? After the

prosecution proved the allegations of fact of the substantive counts against appellant's co-defendants, appellant took the stand and corroborated that part of the evidence against them that had touched upon her.

This was the "charge" against appellant; this was her "defense" to that charge"!

## ASSIGNMENT OF ERROR NO. II

Appellant was entitled to relief from the prejudicial joinder with her co-defendants.

### POINTS AND AUTHORITIES

The Court could grant such relief in its discretion.
Rule 14, Federal Rules of Criminal Procedure.

### ARGUMENT

Obviously, appellant contends in her preceding two Assignments of Error that it was clearly improper to require her to stand trial at all. In a sense, therefore, this assignment of error is superfluous.

If, on the other hand, the Court disagrees with appellant's first two Assignments of Error and finds that the indictment and proof in this cause did place appellant in some fashion legitimately in jeopardy, then appellant urges that there is substance to this Assignment of Error.

In this cause, in any event, the prejudice that resulted from the joinder was that appellant was tried for

the crime of her co-defendants and for no personal guilt of her own.

In addition to the mechanics of the indictment that have already been referred to, there were the actual instructions concerning appellant which were as follows: There was no separate instruction concerning her; there were only these references to the fact that she was charged only in Count XIII:

> "I think this is an appropriate place to point out that, with the exception of Mrs. Davenport, a separate crime or offense is charged against each of the defendants in each count of the indictment . . ." (Tr. p. 1774).

> "These counts charge all of the defendants who are on trial, with the exception of Mrs. Davenport, with violation of this law." (Tr. p. 1788).

> "Each of the defendants, with the exception of Mrs. Davenport, is charged in every count." (Tr. p. 1801).

Even though she was not charged in the substantive counts, the jury was instructed concerning her as if she were. Under the instructions concerning the substantive counts the jury was instructed concerning appellant as a participant in the joint scheme set forth in Count I as follows (Tr. p. 1778):

> "There was evidence in this case that one or more of the defendants named in the indictment organized the Mt. Hood Hardboard and Plywood Cooperative, as well as certain other cooperatives and corporations, and that they used these corporations as well as existing corporations, such as the Davenport Corporation, for the purpose of siphoning off money paid in by the purchasers of memberships in the Mt. Hood Cooperative. If you

> find that the Government has proved this scheme to defraud as to one or more of these defendants, the first essential element in the indictment will have been satisfied . . . You will next consider which defendants, if any, participated therein. If you find that one or more of the defendants devised or participated in a scheme to defraud by knowingly and willfully assisting in the setting up of corporations or the use of existing corporation to permit him or one or more persons to siphon off money paid in by the purchasers of memberships in the Mt. Hood Cooperative, then that defendant is chargeable with participation in the scheme, even though he himself, never made any representations of any kind to a prospective purchaser of memberships . . . and likewise he may be chargeable even though he himself did not personally benefit from it, but if he participated and such participation permitted or assisted another person to defraud the co-op or the members."

Particpiating in the scheme set forth in Count I was not a crime with which appellant was charged and against which she had any opportunity to defend. This instruction was clearly erroneous.

Upon what basis could appellant's standard of guilt be lumped together with the standard of guilt set for her co-defendants by the allegations of fact of the substantive counts? Certainly that she was not charged in the substantive counts, and they were, creates a distinction between them cannot be so lightly brushed aside.

Further, what evidence was there that could possibly support an instruction concerning appellant under Count I? What evidence was adduced under that count of appellant's knowing and willful participation in a

scheme to siphon off money into Errion's pocket through the use of the Davenport Corporation? The testimony of the witnesses Bobbitt, Samuels and Piatt created a complete void in the proof of those counts concerning appellant, matching the like void in the allegations of fact. The allegations of the substantive counts having been proven; that those charged therein, and specifically Errion, as a part of *their* scheme, controlled the Davenport Corporation and used it towards that end, upon what basis was the jury now to hazard under those counts exactly to the contrary of their allegations; that appellant could be considered as an accused therein and that the allegations as in fact set forth were incorrect in that appellant had not been "controlled" by Errion but had played a knowing part in the scheme?

## ASSIGNMENT OF ERROR NO. III

The Court erred in instructing the jury concerning appellant as set forth in Assignment of Error No. II.

### ARGUMENT

This is a formal assignment as error of the instruction set forth haec verba in Assignment of Error No. II.

No specific exception was taken to this instruction; counsel for appellant did, however, except to the submission of the cause as to appellant (Tr. p. 1807).

These instructions have been dealt with more fully in Assignment of Error No. II because, once again, more to the heart of the matter is that they illustrate

the more basic premises set forth in preceding and subsequent Assignments of Error that the indictment fails to charge appellant with a crime and that the evidence was insufficient in any event to sustain her conviction of the crimes charged against her co-defendants.

## ASSIGNMENT OF ERROR NO. IV

The evidence is insufficient to sustain appellant's conviction.

### POINTS AND AUTHORITIES

I.

A count charging conspiracy is an accusation of a distinct crime, and evidence to support it must be so clear and convincing as to leave no reasonable doubt.

U. S. v. Silva, 131 Fed. 2d 247.

II.

A conspiracy is a partnership in criminal purpose. The gist of conspiracy is a meeting of the minds for a definite criminal purpose ripened by doing an overt act. The proof requires proof of an unlawful agreement and participation therein with knowledge thereof.

Sprague v. Aderhalt, 45 Fed 2d 790.
Marino v. U. S., 91 Fed. 2d 691.
Dickerson v. U. S., 18 Fed. 2d 887.

III.

The evidence must show either concertive action in the commission of an unlawful act or other facts or

circumstances from which a natural inference arises that unlawful acts were in furtherance of conscious mutual agreement to commit them.

Windsor v. U. S., 286 Fed. 51; certiorari denied, 43 Sup. Ct. 523, 262 U.S. 748, 67 Law Ed 1212.
Braverman v. U. S., 125 Fed. 2d 283, 63 Sup. Ct. 99, 317 U.S. 49, 87 Law Ed. 23.
11 Am. Jur., Conspiracy, Sec. 4, p. 544.

IV.

To support a conviction for conspiracy based upon circumstantial evidence, the conclusion to be drawn from the circumstantial evidence must exclude every other reasonable hypothesis than that of guilt.

Copeland v. U. S., 90 Fed. 2d 78.
Bryan v. U. S., 175 Fed 2d 223, certiorari granted, 70 Sup. Ct. 69, 338 U.S. 813.

V.

Mere suspicion is insufficient.

Garrison v. U. S., 163 Fed. 2d 874.

## Summary of Argument

Appellant does not intend to assume for the purpose of this Assignment of Error that she was charged in the substantive counts or that the conspiracy count contains any other allegations of fact than those of the substantive counts incorporated by reference. In the preceding Assignments of Error appellant has shown that the indictment contains no allegations of fact against her and that those it does contain against her co-defendants

necessarily limited the proof to be adduced under them, in so far as it might touch upon her, to proof of her innocence. In this Assignment of Error appellant will simply move on to the evidence itself that conformed to these allegations, comparing it with the requirements of proof for guilt of conspiracy, solely for the purpose of making such comparison.

## ARGUMENT

Conspiracy is a distinct crime subject to exact definition. It consists of an unlawful agreement between two or more persons, knowingly participated in by the accused. One must distinguish between approaching the proof frontally, so to speak, from the point of view of proving the existence and terms of an unlawful agreement among a group of alleged conspirators, and of backing in to the same proof from the point of view of each of the individual accused who must be proven to have participated in the unlawful agreement with knowledge of its existence.

The evidence in this cause, considered solely as evidence in support of conviction for conspiracy of alleged co-conspirators, has an unusual aspect distinguishing it from the ordinary case. There was nothing susceptible of the interpretation of being direct evidence that any of the alleged co-conspirators, other than Errion and Munkers, knew of their own knowledge that Errion's representation that he was negotiating with a group of named persons who would finance the project was false.

The evidence one usually finds in such a case is lacking. None of the alleged co-conspirators took the stand to admit that he knew that his representations were false and to identify others whom he declared shared that knowledge with him with common intent to defraud the public. The substantive offense was fraud and there is no requirement that criminal intent need be found merely because a representation is made that happens to be false. (The defendant Martin's acquittal does no violence to reason, for example.) The case does not concern, say, personal contact with proscribed alcoholic beverage as does *Marino v. U. S.*, 91 Fed. 2d 691, or *Dickerson v. U. S.*, 18 Fed. 2d 887.

The unhappy practice of crowning a series of substantive counts with a conspiracy count that does no more than incorporate the allegations of the substantive counts renders it most difficult in the case at bar to ascertain the precise substance of the conspiracy agreement of which the accused are charged. Adding to the difficulty is that each of appellant's co-defendants could be found guilty of the substantive counts without actual knowledge that a fraud was being perpetrated, either being shared with others or being possessed by themselves.

Nor do the instructions aid in the matter.

Since the first paragraph of the first count contains all of the allegations of fact in the cause, this is where the Court dealt with the allegations of fact in its instructions. The jury was instructed that paragraph one alleged a joint scheme and artifice to defraud and charged

the defendants with having participated therein. A defendant who had done so was by virtue thereof liable for each of the individual mailings and sales set forth in Paragraph II of each of the substantive counts without regard to who did the actual mailing or made the sale specified therein (Tr. pp. 1757 et seq.).

Instructions upon the conspiracy count were limited to general definitions of conspiracy, overt acts, etc. They did not include any definitions of the terms of an alleged conspiracy agreement under the allegations of fact (Tr. pp. 1970 et seq.). As the Court stated (Tr. p. 1797):

> "I shall not discuss the facts with reference to this conspiracy count because all this has been covered in the previous instructions . . ."

The Court defined the matter of conspiracy not so much in terms of an agreement as in terms of the evidence of combination or confederation that would support conviction. The original definition was as follows (Tr. p. 1970):

> "A conspiracy may be defined as a combination of two or more persons, by concerted action, to accomplish a criminal or unlawful purpose, or some purpose not in itself unlawful or criminal, by criminal or unlawful means. The gist of the offense is the unlawful combination *or* agreement to violate the law." (Emphasis added)

This is immediately followed by a reference to "the conspiracy *or* agreement" and by instruction upon the lack of necessity of a formal agreement, it being sufficient if "two or more persons, in any manner or through any contrivance, impliedly or tacitly, come to a mutual

understanding to accomplish a common and unlawful design, knowing its object."

Thereafter the Court used the word "conspiracy" without further substantial use of the word "agreement."

Under the substantive counts the jury was instructed that an accused could be guilty thereof, and thus could have criminally participated in the scheme set forth therein, if he made any of the alleged representations without regard to whether they were true or false.

> "However, statements made without regard to whether they were true or false and put forth without any basis for the purpose of obtaining money or property from another are fraudulent." (Tr. p. 1766).

He could thus participate in the scheme even though he did not act in concert with anyone:

> "In other words, one defendant may be guilty because he has devised or participated in a scheme to defraud by siphoning off money through the use of the devise described in Count I, while another defendant *who did not act in concert with the first defendant and did not devise or participate in such scheme to siphon off money,* may also be guilty, if he knowingly and willfully made false representations for the purpose of selling membership to a prospective purchaser." (Emphasis added) (Tr. p. 1779)[7]

---

[7] During the taking of exceptions the Court explained to counsel that these instructions were intended to cover the individual liability of an accused for an individual scheme consisting of his own representation made without regard to whether it was true or false (Tr. pp. 1811-1812). However, each accused was charged as a participant in a joint scheme and this was the ultimate finding that the jury was to make. For example, there should have been liability only upon a substantive count concerning a sale

And finally the jury was likewise instructed, that it made no difference whether or not an accused believed that financing had been assured and that

> "Phillips or Howard or other persons would loan the cooperative $4 or $5 million dollars with which to construct a plant . . . if they knowingly and willfully participated in the scheme to defraud as outlined in Count I, or if they knowingly and willfully made false promises or representations with reference to other matters to prospective purchasers." (Tr. p. 1779).

Disregarding all of the permutations of "combination" and "confederation" of *action* possible under the substantive counts which would render an accused liable upon those counts, and starting afresh with the conspiracy count itself to ascertain therefrom the terms of the *agreement* charged thereby, one thing is certain: The essence of the latter count is an agreement to perpetrate a fraud for the subsantive crimes referred to therein are using the mails to defraud and fraud in the sale of securities. As to this, it is clear that for such an agreement to exist and for any of the accused to have been a party thereto, two or more of the alleged conspirators had to participate therein with knowledge of

---

made through the particular accused's representation if that representation is to be considered as his individual scheme. When his own individual scheme created liability upon his part for a sale and mailing made pursuant to the individual scheme of another, "joint participation" was necessarily involved. Furthermore, as will be pointed out, should not the Court have withdrawn the submission of the conspiracy count as to each accused as to whom these instructions were apropos and not abstract? If the evidence concerning him was susceptible of this interpretation, did not this fact in itself render it impossible to say that every reasonable hypothesis other than that of actual knowledge and of knowledge shared could be ruled out in so far as his guilt of the conspiracy count was concerned?

the fraud shared between them as the substance of an agreement.

These are the ultimate findings required for conviction upon this count.

At a very minimum, to avoid an inference based upon an inference, the evidence to support this as to each accused had to be direct evidence of actual knowledge of the fraud. This in itself would not necessarily require that the jury find that a conspiracy agreement existed or that an accused with such knowledge participated therein; but, without such direct evidence of actual knowledge, the jury could draw no single inference that such knowledge was shared with common design and in common agreement.

Lesser evidence of knowledge than direct evidence thereof would require two inferences, first, of knowledge, and secondly, of knowledge shared. Circumstantial evidence of knowledge, however, cannot preclude, as a matter of law, a reasonable hypothesis of actual ignorance—particularly in this cause where the question to be resolved was whether the accused had been deceived by Errion, the master swindler, or had actual knowledge of what the man was up to.

The fraud in this case, at least in so far as the fraud to be shared under the conspiracy count is concerned, is not so complex as a first reading of the instructions upon the substantive counts may make it appear. It is simply that the Mt. Hood Cooperative was a fraud and a swindle because it could not come into existence as represented; there was no one who had

assured Errion that financing would be provided for the construction of its plant. This was a lie upon his part.

If this is the knowledge that is to be shared, it is obvious that in so far as appellant is concerned, the evidence does no more than cast suspicion upon her in no greater measure than it is cast upon any of the prosecution's witnesses who similarly served his convenience but whose innocence is to be presumed.

Of course, appellant was not even a "participant" in any unlawful agreement if any had existed, as required by the general law of conspiracy in order to be guilty of the crime. In the final analysis the Grand Jury concluded that appellant did not participate in the substantive offenses; that there did not appear in the facts before it acts committed by appellant that in themselves were either directly a part of the substantive offenses or indirectly such a part thereof as to show an intent to commit the substantive offenses.

Yet this is precisely what must be alleged and proven to convict appellant of the crime of conspiracy under the theory upon which the indictment purports to charge the crime against each of the accused.

How far short of supporting appellant's conviction does the proof fall? It is a patent absurdity that appellant, in her eighties, with a lifetime of civic virtues behind her, knowingly intended to see a theft of a half million dollars from the public to no gain to herself, and to end her days as a convicted felon, all solely as a favor to Edgar Robert Errion. No one can seriously entertain

this thought, and there is not one scintilla of evidence to support it.

* * *

A conspiracy is a partnership in criminal purpose. The gist of the conspiracy is a meeting of the minds for a definite criminal purpose that ripens into the crime by the doing of an overt act. The proof requires proof of an unlawful agreement and participation therein with knowledge thereof (*Marino v. U. S.,* 91 Fed. 691; *Dickerson v. U. S.,* 18 Fed. 2d 887).

As is stated in *U. S. v. Silva,* 131 Fed. 2d 247 at page 249:

> "There is no magic about a count charging conspiracy. It is simply an accusation of a distinct crime and evidence in support of it must be so clear and convincing as to leave no reasonable doubt. The Government merely fails in its proof when its evidence but creates a sort of mystery as to which one guess is as good as another."

This Court stated in *Terry v. U. S.,* 7 Fed. 2d 28 at page 30:

> " . . . a conspiracy is not an omnibus charge under which you can prove anything and everything, and convict of the sins of a lifetime."

The distinction between proving the existence of an alleged conspiracy agreement among a given group of conspirators and proving that a particular accused was a part of the conspiracy is well illustrated by the following two citations. Speaking of the former the Court in *Windsor v. U.S.,* 286 Fed 51, states as follows upon page 53:

> "This Court held in *Davidson et al v. U. S.,* 274 Fed. 285, that a verdict of guilty of conspiracy

> may be sustained by evidence showing a concert of action in the commission of an unlawful act or by proof of other facts and circumstances from which the natural inference arises that the *unlawful overt act* was in furtherance of a common design, intent and purpose of the alleged conspirators." (Emphasis added)

Viewing the matter from the point of view of the particular accused, the Court states in *Dickerson v. U. S.*, 18 Fed. 2d 887 at page 893:

> "To warrant a conviction for conspiracy to violate a criminal statute, the evidence must disclose something further than participating in the offense which is the object of the conspiracy; there must be proof of the unlawful agreement, either expressed or implied, and participation with knowledge of the agreement."

Appellant will not belabor the evidence that touched upon her. It is set forth in the Appendix. It simply affords a factual basis for the conclusion that appellant did not criminally participate in the substantive offenses. She had no dealings with the public and received no financial gain. Her activities were solely confined to being used as a personal convenience by the defendant Errion. She did not participate in an unlawful overt act. Nothing that she did would in itself convey to a person doing it, either that they were performing an illegal act or that what they were doing was a necessary ingredient to an illegal scheme.

The issue posed by the allegations of the substantive counts is not appellant's motive in being of convenience to Errion, but Errion's motive in using appellant as a convenience to himself. This is no issue as to appellant.

It is patent that the "participation" required of an accused under the general law of conspiracy is, in the case at bar, participation in the substantive offenses as charged against appellant's co-defendants in the indictment. Even if one refuses to characterize appellant's "participation" in the fashion set forth in the allegations of the substantive counts and insists upon brushing aside all frailties of the indictment, demanding the right to drawn independent inference from the evidence adduced that touched upon appellant, it is still impossible to bridge the gap between facts proven and the proof required to establish her guilt of a conspiracy count.

To refuse to accept that the evidence proved that Errion "controlled" appellant is simply to assert that the evidence proved only that she played this role and to insist that whether she did so as an innocent dupe or a knowing accomplice are conclusions, either of which may still be drawn as one sees fit.

That is to say, as to which one guess is as good as another.

In the final analysis the Grand Jury concluded that appellant had not criminally participated in the substantive offenses. Under the law of conspiracy, therefore, she is equally innocent of having participated in any conspiracy to effect them. Nor did the Grand Jury actually intend to charge her with any such facts. It intended to charge her with association with Errion at this time, the man being a scoundrel who had likewise practiced deceits upon others in the past, leaving it to a pettit jury to determine whether or not she

should be censured for doing so. There was no question but that she was actually innocent of any knowledge of his *scheme*. It was what she should have known about the *man* (despite her age, sex and the trappings with which he surrounded himself and his great charm and persuasive powers), in view of the particular past deceits he had practiced upon her. These included, of course, convincing her of his innocence of past deceits upon others to her monetary loss.

This is no crime and therefore the indictment states no crime. But in the meantime, who dare have the temerity to assert that even upon this basis appellant warrants censure instead of sympathy? Certainly no one who pauses to consider the matter well. Errion was a bold and fantastic swindler because he had victims who were boldly and fantastically gulled. His powers of deception are to be measured by the extent to which his victims were deceived. Appellant was not alone in being deceived. When the evidence is consistent with appellant having been in fact deceived, at what point can one assert, "This is too much; beyond this point she should not have been deceived."

Birds of a feather may flock together, but among those that flock around the swindler are those that he has attracted there to be plucked.

Appellant was a badly deceived, badly imposed upon, elderly woman whose judgment was warped by the wiles of a swindler who deceived a great many other persons, many with minds far younger and sharper than her own.

But as greatly as Errion abused her, one can picture the terror and confusion, the physical and mental hardship, that appellant must have endured in this trial, at her age and with her past background, where she was charged with nothing and could defend against nothing?

## ASSIGNMENT OF ERROR NO. V

The Court erred in informing the jury that the defendant Errion had pleaded guilty.

### POINTS AND AUTHORITIES

I.

It was error for the Court to inform the jury that the defendant Errion had pleaded guilty.

Nigro v. U. S., 117 Fed. 2d 624.
Walker v. U. S., 93 Fed. 2d 383, 395.

### ARGUMENT

The cause, of course, started right out revolving around the defendant Errion.

On the afternoon of the third day, the Court stated as follows (Tr. p. 493):

> "We are not going to try Mr. Errion here any longer. He has pleaded guilty. He is safely in jail. I think that we have all we can do to try the other six defendants that are here without discussing Mr. Errion any further."

The occasion was the recall of the witness Vai by counsel for the defendant Wright to elicit from him an

occasion when Errion had commented upon persons who had fled from the territory of the United States to escape extradition (Tr. p. 493). This was relative to the defendant Wright's defense that his return of the $290,000.00 to the Mt. Hood account was proof of his innocence of having partaken of any scheme of Errion's.

A few moments after the foreging statement, the Court stated as follows (Tr. p. 494):

> "Ladies and Gentlemen, I want to make one thing clear to you, as I will in the instructions: These people that are on trial, these seven defendants are the only ones on trial. They are the only ones on trial, and you will be called upon to determine the guilt or innocence of these seven persons and no other persons. Mr. Errion is not involved in this case. I mean you will not have to determine whether Mr. Errion is guilty or not guilty. He has already pleaded guilty. The same is true of Mr. Montgomery. You might like the United States Attorney, or you might not like him, and the same is true of any of the Government officials, the Securities and Exchange Commission representative, or the Post Office representative, or any of these witnesses who have appeared here. Perhaps they have been guilty of a crime; perhaps they should have been indicted, but you do not have to determine whether they should have been indicted or whether they are good people or bad people, only to the extent that their credibility may have been affected by something which they did or did not do, and that is why I have permitted wide discretion on the part of the attorneys in interrogating some of these witnesses; not for the purpose of determining whether they are guilty or not guilty of a crime or whether they are good people or bad people, except in so far as the type of person the witness is determines how much credence you may

put in the statements which that person has made. "Do I make myself clear on that?"

The latter part of this statement was occasioned by the fact that in many instances it was impossible to make a factual distinction between witnesses for the prosecution and some of the accused. In some instances it seemed as if the role a witness had played could be directly compared with the role of a particular accused. In others, it seemed as if the witness had behaved in a far more reprehensible fashion. In all instances (except for the mere formal witnesses) they too, had been deceived by Errion into furthering his scheme by whatever their participation had been.

As the cause progressed, it was impossible for anyone to adhere to the admonishment of the Court relative to not trying the defendant Errion. The facts did not permit the prosecution to depart from this course.

The Court's announcement was clearly prejudicial. Both fraud and conspiracy were thereafter facts that conclusively existed.

The announcement was particularly onerous upon appellant. Her sole involvement under the allegations of fact was whether Errion had perpetrated a fraud and had used her services in doing so. The Court did not inform the jury that in fact Errion had pleaded guilty to two substantive counts, II and IX, and Montgomery to one, the conspiracy count, nor does this record anywhere reveal these facts. As far as this record and this announcement goes—both had pleaded guilty to all counts, including conspiracy. A conspiracy existed

(two having pleaded guilty to it) and under the theory of the indictment, i.e., if the allegations of the substantive counts (against Errion) were true, appellant could be convicted of the conspiracy count, appellant's conviction became a foregone conclusion.

The possibility that it would be faced with a trial revolving around a man not even present in the courtroom (because he might plead guilty) was a difficulty the Government invited by this mass indictment. This was not choice of the accused, and appellant in particular moved for a separate trial.

In instructing the jury, the Court stated as follows (Tr. p. 1750):

> "As I told you at the commencement of this trial, Edgar Robert Errion and Roland L. Montgomery have entered pleas of guilty to certain counts in the indictment. The fact that they entered pleas does not necessarily mean that they alone are responsible for the crimes charged in the indictments, nor does it necessarily mean that each or any of the other defendants is guilty with them. In fact, it is no evidence of their guilt or innocence or that a crime was committed. (That is, the pleas of Errion and Montgomery are no evidence of the guilt of any of the defendants nor evidence that a crime was committed.) The guilt or innocence of the defendants who are on trial must be determined by you solely by the evidence introduced at this trial."

Under the indictment in this cause, it was impossible to cure the prejudice to appellant occasioned by the jury having been informed that the man whose convenience she had served had acknowledged by pleading guilty that he had been engaged in the perpetration of

a fraud and that he had headed a conspiracy to defraud. There was no denying what she had done, nor was it an apparent unlawful act in itself; the "issue" was only its ultimate effect, i.e., what Errion was doing when he had her do it.

## ASSIGNMENT OF ERROR NO. VI

The Court erred in denying appellant's motion for a judgment of acquittal.

### ARGUMENT

Appellant makes this formal Assignment of Error that the Court erred in overruling her motion for a judgment of acquittal. The same was erroneous upon the propriety of the Assignments of Error urged herein and set forth in said motion as the grounds thereof.

## SUMMARY

This cause contains no indictment of appellant for conspiracy, but it does contain an indictment, and the most severe indictment possible, of the indiscriminate use of the conspiracy count, and of the practice of crowning a series of substantive counts with a conspiracy count that does no more than allege a conclusion of law and incorporate by reference the allegations of the substantive counts.

The practice creates the impression that the crime is merely a legal fiction and completely synthetic. Here,

matters got so far out of hand that it could not be recognized that appellant was being convicted upon evidence of innocence and without any issue whatsoever of personal guilt having been set forth in the indictment or being tried in the cause.

Respectfully submitted,

DAVID M. SPIEGEL,
Attorney for Appellant.

## APPENDIX

This record in this cause is primarily concerned with the defendant Edgar Robert Errion. And this despite the fact that he pleaded guilty (to two substantive counts although the jury was only informed that he "had pleaded guilty"; Tr. p. 493) and did not stand trial; nor was he called to testify.

He emerges from the record as the principal malefactor; a bold swindler who initiated and engineered the promotion of a plywood cooperative of some 550 members at $1,000.00 per membership, as a fraudulent scheme from which he intended to benefit.

He was nominally a resident of Salem, Oregon, where he lived the life of a gentleman farmer in a suburb of that community (Tr. p. 168), oft-times referring to himself as a retired Army officer (Tr. p. 512). The record reveals that he is possessed of an utterly fantastic personality. He had the imagination and desire to conceive this half-million dollar fraud, coupled with an ability to charm (Tr. pp. 1399 et seq.), to generate enthusiasm (Tr. pp. 1263-64), and to inspire confidence and faith in his credibility far beyond reason. As early as page 439 of this Transcript of some 1850 pages, the trial court observes that there is no further need of any questions concerning his persuasive powers.

It is difficult to follow some of the more dizzying convolutions of his plot. He could lie; drop names; surround himself with legitimate personalities including

the most prominent of counsel, and seemingly at times, conduct himself as if he himself believed in his fabrications as reality.

In 1941 he promoted an oyster bed cooperative in Coos Bay, Oregon, that left behind it a trail of civil actions for fraud (Tr. p. 1087). In 1953, the year before this venture, he started two other plywood cooperatives, the Beaver at Salem (Tr. p. 1088) and the National at Independence, Oregon (Tr. p. 518). These were halted by an injunction of the S.E.C. (Tr. p. 1518). In addition he was at some time, apparently, subjected to criminal prosecution, similar to this one, in which he was acquitted (Tr. p. 1258). None of the accused in the cause at bar were involved in these two cooperatives except the defendants Munkers, who was a party to the injunction (Tr. p. 1092), and Bones, who was a salesman for memberships in the Beaver Cooperative (Tr. p. 1208).

Notwithstanding, at the time this venture began in 1954, although he had achieved a certain amount of notoriety in the Northwest by virtue of the nature of the cases in which he had been involved and the sums of money concerned (Tr. pp. 1525-1526), his poise was obviously not greatly ruffled and correspondingly his activities not greatly hampered.

The program he espoused here was the establishment of a plywood cooperative in the vicinity of Estacada, Oregon, close by the Mt. Hood National Forest. Here vast amounts of Government timber could be harvested and not far distant, within the forest itself,

the Government had laid out a proposed townsite for a forest community to be named Ripplebrook where the members of such a cooperative could build their homes and establish their own community (Tr. pp. 882 et seq.).

The heart of his program, however, was his representation that he had had preliminary negotiations with an "Eastern firm" (Tr. p. 269) (which later became a syndicate of "Texas oil millionaires," Tr. p. 503, including a contact with one P. R. Phillips, of Phillips Petroleum), through which he had obtained assurance of financing for such a project. Because the money for plant construction could be borrowed from this source, the memberships could be sold for a sum far less than usual and only to gather the necessary operating capital.

This was the venture Errion proposed. First he gathered together the incorporators necessary for the incorporation of the cooperative and the separate corporation to sell its memberships (Tr. p. 267). This reached far beyond the accused in this cause. Of the five incorporators for the cooperative, for example, only two, Locke and Williams, were indicted. The others were one Tucker, one Schroeder and one Current (Tr. p. 279). When these incorporations had been accomplished, a sales force came into being and began selling memberships. When the memberships had been sold, the cooperative itself came into existence as organized by its 550 members, and upon its Board of Directors sat a number who were likewise other than any of the accused.

Errion's original representation became the repre-

sentation of the salesmen engaged in the actual selling that the monies for plant construction would be borrowed while the money paid in for memberships would be retained for operating capital. Later, it became the means by which he entered into "negotiations" with the organized cooperative purportely upon behalf of the financial backers; "negotiations" by which he attempted a grand theft of some $290,000.00 from the cooperative's treasury.

Errion's representation was proven to be false of his own knowledge by direct evidence.[8] The real P. R. Phillips of Oklahoma City, Oklahoma, was produced to testify that he had never heard of Errion or his cooperative (Tr. p. 995). In the "negotiations" referred to Errion made use of a letter setting forth the terms of the "backers" and purportedly signed by one "P. R. Phillips." The witness Howard, no Texan and no millionaire, testified that he had signed such a letter at Errion's request and in the presence of only the two of them (Tr. p. 523).

The defendant Locke is a 78 year old retired furnace repair man whose home was likewise in Salem (Tr. p. 1641). He was an incorporator of the cooperative and the separate sales agency established to sell its memberships. Upon the organization of the cooperative by its members, he was elected president. The defendant Bones, aged 69, was a gardner and also a resident of Salem (Tr. p. 1170). He likewise was an incorporator

[8] At one point he even went further; the witness Vail testified that Errion informed him that there was in fact two million dollars on hand in the form of a letter of credit in a Portland bank (Tr. p. 421).

of the two corporations. After that he sold memberships from an office in the vicinity of the proposed plant site. He had also sold memberships in the Beaver cooperative (Tr. p. 1208), but, on the other hand, he bought some of Errion's oyster beds (Tr. p. 1318). The evidence revealed that prior to the events concerned here, Errion had involved these men in his tangled affairs (occasioned by the lawsuits against him) by borrowing sums of money from them (Tr. pp. 729-1373) (as well as appellant (Tr. p. 1423),) and creating a corporation to hold his property in which these two men were officers and held stock as security, etc. (Tr. pp. 606-1718).

The defendant Williams was a lieutenant in the Oregon State Police (Tr. p. 1391), whom Errion met about this time as a casual acquaintance (Tr. p. 1393). Errion cultivated him until he likewise became an incorporator of these two corporations and his son-in-law, the witness Samuels, the secretary of the cooperative during its membership sales period (Tr. pp. 1393 et seq.).

These men, together with Tucker, Schroeder, Current and one Buhl and one Kelly and one Ray Lock likewise became incorporators of various other corporations conceived by Errion to add to the cooperative's attractive features by separate cooperatives to buy its timber and to sell its finished products at an advantage to the membership (Tr. pp. 280, 282).

Wright is 43. He is the nephew of the defendant Munkers (Tr. p. 1252), and, while he had been introduced to the defendant Errion by his uncle at an earlier

time, he had not before been involved in any transaction with him. Errion made him manager of the sales agency (Tr. p. 1266) and subsequently, for a period of time, he was general manager of the cooperative after it was organized by its members (Tr. p. 1345).

Montgomery and Martin were salesmen for the sales agency. The defendant Montgomery pleaded guilty to the conspiracy count (although again the jury was only informed that he had "pleaded guilty"; Tr. p. 494), for reasons that are a complete mystery in so far as the record is concerned, since the record, with ample opportunity, in no wise particularly connects him with Errion or with the stratagem directly employed by Errion to get the cooperative's money into his pocket. The defendant Martin was the only accused acquitted.

The defendant Munkers is in a different position than any of the others. He was an earlier acquaintance of the defendant Errion and had been involved in the oyster bed promotion with him (Tr. p. 1049). He first appears as being placed upon the payroll of the organized cooperative as a "financial engineer" (Tr. p. 120) upon the recommendation of Errion (Tr. p. 1307). He was involved in both of Errion's prior cooperative ventures of 1953 (Tr. p. 515). The witness Snyder, an officer and director of the organized cooperative, testified that during the purported "negotiations" Errion introduced the defendant Munkers to him as a representative of the purported financial backers (Tr. p. 35). In addition the witness Jack, counsel for the cooperative, testified that Munkers introduced himself to him as the "contact" man of the financial backers (Tr. p. 755).

Appellant, of course, was only used by Errion in the fashion indicated by the allegations of the indictment concerning the Davenport Corporation. Since this was all with which the prosecution's case was concerned, how Errion induced her to serve his convenience in this fashion was left to her own testimony and will be dealt with in like fashion here.

The pathway by which Errion profited was simple. At the inception of the cooperative when he had counsel (the witness Bobbitt) draw the Articles of Incorporation for the cooperative and the separate corporation to sell the memberships, he had counsel draw a contract granting him ten per cent of the sales price of the memberships in return for services to be performed by him (1) as promoter, (2) in locating and purchasing a plant site for the cooperative, and (3) in obtaining financing for the project (Ex. 6). This is the contract referred to in the indictment that was "caused to be executed" in the name of the Davenport Corporation. It was signed by the witness Samuels and the defendant Williams upon behalf of the cooperative (Tr. p. 188) and appellant upon behalf of the Davenport Corporation. Through it Errion obtained ten per cent of the sales price of the memberships as they were sold, and after the organization of the cooperative, purchased upon its behalf its plant site. The cooperative paid $58,500.00 for this land, but it was purchased from its owners for some $25,000.00 less, Errion pocketing the difference.

He was in the middle of a grand theft of some $290,000.00 from the cooperative's treasury through the "financing" of the project when ostensibly by the act

of the defendant Wright, his plan was thwarted and his machinations revealed.

* * *

It seems patent that the prosecution proved that the fraudulent scheme was Errion's; and not by implication. Witness after witness for the Government put it in the direct words; "This plan was Errion's" (Vai, Tr. p. 412; Bobbitt, Tr. p. 266; Samuels, Tr. p. 168). The falsehood that went to the heart of the matter would appear to be his representation of a personal contact that assured financing that he alone professed to have and that he set afoot before each of the other accused became actively connected with the venture. There can be added to this that if the evidence purports to trace his promotional fee or the profit he made upon the plant site beyond him, it is by speculation only. There was equally no evidence that he was going to share with any one the large sum he was trying to get his hands upon when his plans collapsed. He did owe appellant, as well as Locke and Bones, considerable sums of money which he had extracted from them prior to this occasion and he did pay some of this back during the course of this transaction.

There was no real attempt by the prosecution, however, to controvert the creditor-debtor relationship testified to by the witness Piatt (Tr. p. 637), and these defendants, as the cause of these payments.

Further, his representation of an assurance of financing does in fact go to the heart of the representations alleged in the indictment. Those submitted to the jury

were as follows: (1) That members were assured job security in a plant to be constructed at Estacada, Oregon. (2) That finances had been arranged for the construction of this plant, (3) That the members' own money would be retained as operating capital and (4) That the General Timber Cooperative had large tracts of timber it would sell to such a cooperative at market price (Tr. p. 1761).

In submitting the substantive counts to the jury the trial court instructed upon the customary rules of fraud and no differently than if the accused in those counts were individually standing trial. The jury was instructed that a representation made without regard to whether it was true or false can be fraudulent (Tr. p. 1766). They were likewise instructed that to find any particular defendant guilty of any substantive count, they need only find that he made one (or more) of the foregoing misrepresentations under the foregoing circumstances (Tr. p. 1778).

The testimony of the witnesses Howard and Phillips was direct evidence that the defendant Errion knew of his own knowledge that the first three of the foregoing representations were false. The testimony of the witnesses Jack and Snyder is like evidence of the same fact as to the defendant Munkers. As appellant reads the record, however, there does not appear to be like evidence as to any other defendant.

It likewise appears that direct evidence that Errion knew his program was a fraud must have been material to the prosecution's case against the other defendants or

else these witnesses would not have been produced since Errion was not on trial. Their testimony proved that any statements concerning the cooperative—that its financing was assured, that a plant would be built, etc., were in fact false. From this fact, coupled with the foregoing instructions, appellant concludes that the case against appellant's co-defendants was that of their individual, and not joint, liability based upon statements shown to be in fact false, giving rise to a permissible inference that they were made without any basis.

The General Timber Cooperative came into being as a separate corporation that would be used to purchase the timber needed by the plywood plant for resale to the cooperative and at an advantage to the latter and apparently only to make the program as a whole more attractive (Tr. p. 281). It does not seem to have been organized for the purpose of holding it out as a holder of timber already purchased. Its incorporators included the unindicted Buol, Kelly and Ray Lock as well as the defendants Locke and Williams (Tr. p. 282). That it was held out to be the holder of timber seems to be a representation that first appears in the testimony of the witness Orell, a member, who testified that the defendant Bones stated the same to him in inducing his purchase (Tr. p. 368). It would seem probable, therefore, that the responsibility of the others for this representation of the defendant Bones would have to rest upon whether or not other facts proved him to be their co-conspirator.

If the conspiracy agreement intended to be alleged

by the conspiracy count, involved, under the evidence, sharing with Errion actual knowledge of his fraud and how he intended to capitalize upon it, then there is abundant indicia appropriately summed up by the instructions referred to, which were not abstract, that no such agreement ever existed. It may well be that the true status of the conspiracy count is that for lack of direct evidence of actual knowledge and for the inability of circumstantial evidence, no matter how strong, to ever preclude the hypothesis of actual ignorance, the facts in this case did not warrant submission of the conspiracy count as to any other than the defendant Munkers.

* * *

The evidence adduced to prove the allegations of the substantive counts concerning the control and use of the Davenport Corporation by the defendants charged therein is the sole evidence that touched upon appellant and is therefore the evidence that is of prime concern to her.

It can be characterized as merely evidence in the trial of her co-defendants for their crimes that happens to mention her.

Proof of the allegations that the defendants therein (actually Errion) caused a contract between the cooperative and the Davenport Corporation to be executed by means of which a large portion of money paid in for memberships was diverted to those defendants' (again actually Errion's) use is found in the testimony of the prosecution's witnesses Bobbitt, Milkes, Samuels and Piatt.

The witness Bobbitt, counsel of the highest integrity and repute and a former agent of the Federal Bureau of Investigation, testified that during this time he never met appellant (Tr. p. 293). He had no discussions with her (Tr. p. 301). He was hired by Errion to do the legal work (Tr. p. 277). His initial and principal contact was with the defendant Errion (Tr. p. 266; Overt Act No. 2, Count XIII). Pursuant to consultations with Errion and sometimes with members of the subsequently formed Board of Directors of the cooperative (including others than those indicted), he drew Articles of Incorporation for the cooperative (Tr. p. 274) and a separate corporation (the Forest Products Cooperative) that was to be the sales agency for the cooperative's memberships (Tr. p. 296). Upon order of Errion (Tr. p. 306) he drew a contract between the cooperative and the latter agency giving the latter ten per cent of the sales price of the memberships for his effort in selling the same and another contract between the cooperative and the Davenport Corporation, calling for the payment of a second ten per cent for services (1) as a promotional organizer, (a role only Errion was playing); (2) for locating and purchasing a plant site (the second avenue by which Errion intended to profit) and (3) for obtaining and perfecting the cooperative's financing. (No one but Errion had the fortunate contact with the "Eastern financiers" or the "Texas oil money.")

From the beginning the witness Bobbitt had understood that Errion would be concerned in aiding the establishment of the cooperative and its financing (Tr. p. 269).

To continue its proof that the contract between the cooperative and the Davenport Corporation was in reality that of the defendants charged under the substantive counts (in fact Errion) and the payments it provided for theirs (Errion's), the prosecution produced the witness Samuels. The witness Samuels was the first treasurer of the cooperative during its promotional period (Tr. p. 150). He testified that he was hired by Errion (Tr. p. 151) and that he wrote the checks during this period (Tr. p. 152). From the sales agency he received the sums paid for the memberships less ten per cent (Tr. p. 154); to Errion he paid the latter his ten per cent. The checks were made out to the Davenport Corporation but delivered to Errion personally (Tr. p. 157). Errion had always been Johnny-on-the-spot, with his hand out, to receive the ten per cent called for by this contract (Tr. p. 158). The witness Samuels had had no discussion with appellant over the matter (Tr. p. 160). The last he saw of these checks was as they "went into Mr. Errion's pockets" (Tr. p. 182).

The witness Samuels likewise testified that he and his father-in-law, the defendant Williams, had executed the contract with the Davenport Corporation upon the behalf of the corporation, as its President and Secretary, under circumstances showing fully their understanding that it was Errion's contract (Tr. p. 188). "All of the planning came from Mr. Errion" (Tr. p. 168). "He did the promising" (Tr. p. 200).

Earlier the witness Milkes, a certified public accountant retained by the defendant Wright identified by checks by which these payments had been made.

The contract and checks being in the name of the Davenport Corporation, in logical sequence, the prosecution established that there was checking account in that name into which these checks were deposited and that the account was in reality Errion's.

The evidence concerning this account was adduced through the prosecution's witness Piatt. She stated directly that the account was Errion's (Tr. p. 581).

She testified that she had known appellant for many years (Tr. p. 566). In December, 1954, she was working in Ashland, Oregon, when appellant contacted her and asked if she would be interested in employment as Errion's secretary. In March of 1955 she accepted the employment directly from Errion (Tr. p. 586).

A major portion of her job was handling Errion's money. She identified the checkbook for this account and stated that the checks it contained that were written prior to her employment were in appellant's handwriting (Tr. p. 584).

She testified that she had understood from both appellant and Errion that this account contained only Errion's money; that it had been used by Errion since the inception of his promotion of the cooperative and that appellant had merely been writing his checks for him (Tr. pp. 569, 570, 581). Upon her employment the checkbook was turned over to her and her signature authorized to make withdrawals at the bank (Tr. p. 568). Thereafter, she generally carried Errion's money around in the form of cashier's checks until she wished to draw a check, then made such deposit as was neces-

sary for that purpose (Tr. p. 570). At one point she was carrying some $34,000.00 (Tr. p. 575). Ultimately, under Errion's direction the account was closed by simply allowing it to remain dormant with the sum of $3.50 in it (Tr. p. 586).

So much for those allegations that concerned the defendants' charged under the substantive counts use of the Davenport Corporation as a means by which they had drawn off a substantial portion of the moneys paid in for memberships.

The prosecution next turned to proving the allegations of the substantive counts that the defendants, again actually Errion, had caused Mt. Hood's own agents, employees and officers to procure options upon property for a plant site in the name of the Davenport Corporation, had then taken funds from Mt. Hood to purchase it in the name of the Davenport Corporation and had then resold the land to the cooperative at a large profit to themselves and the corporation they controlled.

The transaction concerned two tracts of land and the ultimate purchases were handled in escrow (Tr. p. 1077-1078). However, one deed to both pieces from the Davenport Corporation to the cooperative was introduced and it bore the signature of appellant as president and one I. H. Phillips as secretary (Ex. 141). How and when appellant executed the same was left to her own testimony.

The options to purchase this land were taken during the membership selling stage. One owner, the witness Posey, testified that he dealt with the defendant Munk-

ers (Tr. p. 906) and gave him an option to purchase for a price of $14,000.00 running to the Davenport Corporation. As to the other piece, the witness Banks testified that he was a resident of Salem who had known Mr. Locke for many years; that he had been hired after an interview with the defendant Williams and Errion to be a future "secretary-manager" of a sawmill and glue line plant (Tr. p. 917). He was thereafter asked to take part in the negotiation for the plant site. He located the second piece owned by the witness Alspaugh and was then instructed by Errion to take an option to purchase it in the name of the Davenport Corporation (Errion's explaination: "It would aid in the financing;" Tr. p. 920). The price was $19,000.00 together with the $500.00 of his own money he paid for the option. He was later reimbursed by check of the Davenport Corporation delivered to him by Errion (Tr. p. 922).

The witness Current then testified that he was a member of the Board of Directors of the cooperative and identified two records of minutes. The first showed that on motion of C. Schroeder seconded by W. Kelly, a check was made out to the Davenport Corporation for $31,500.00 to apply on the purchase of 90 acres of land in Estacada (Tr. p. 932). The second showed that at a subsequent meeting upon motion by C. Schroeder seconded by W. W. Locke a check was issued for the balance due upon the land at Estacada in the amount of $27,000.00 (Tr. p. 933).

Nothing shrieked more of appellant's innocence in this matter than the testimony of the defendant Munk-

ers who started out by stating that his instructions concerning the purchase he made came from appellant and that he had had no dealings with Errion concerning it (Tr. p. 1035). On cross-examination he tried to exhibit that he had no understanding that the options when taken were for the purpose of obtaining a plant site for the cooperative (Tr. p. 1085). Upon instruction of Errion, he billed the Davenport Corporation for the sum of $18,000.00 for services rendered for this and other dealings with and for Errion, delivering the bill, of course, to Errion (Tr. p. 1107). However, he received no payment (Tr. p. 1136).

* * *

Other portions of the testimony touching upon the defendants' relationship to appellant were as follows:

It was established that the house in which appellant lived is situated on the main street of a suburban business district in the City of Portland and that it had office space attached to it on the sidewalk level which was occupied by the sales agency that sold the memberships, and, after its organization, by the cooperative itself for a short period of time (Tr. p. 836). A reasonable rent was paid appellant for this occupancy (Tr. p. 134-848).

When printed copies of the prospectus and by-laws of the cooperative circulated among perspective members were introduced, it could be seen that they bore upon the base of their title page the imprint of having been copyrighted by the Davenport Corporation (Ex. 28, 30).

There was likewise a contract by which the Davenport Insurance Agency was to procure such insurance as would be required by the cooperative and one of the committees created by the members themselves after their organization was for the formation of a possible group plan for the purchase of individual insurance of various kinds. This committee circularized the members for its interest in such a proposal, stating that such a plan would be put into effect through the aid of the Davenport Insurance Agency. There was no evidence adduced that appellant could have in any way profited through such a transaction other than as a legitimate insurance agent and then only if the cooperative itself were a legitimate enterprise with a continuity contemplated for its membership.

Appellant's testimony in her own defense was, of course, simply that of another witness for the prosecution offering further evidence in support of the allegations of fact of the substantive counts against the defendants charged therein. For herself, she could only add the details that gave coherence to the evidence from which it had already been concluded that she had not criminally participated in the substantive counts.

She had known Errion for many years. When she and her husband had been engaged in the insurance business, he had upon occasion occupied office space in their office (Tr. p. 1423). Over the years he had borrowed moneys from them that he had never repaid; at the time of trial, his debt totaled $40,000.00 (Tr. p. 1423).

The office space attached to appellant's home had been first rented to Errion by her husband during his lifetime for use by Errion and two other associates (not indicted) working with him in authoring the prospectus and by-laws for a plywood cooperative. From one of these men, one Murray, she learned they were working under the advice of three different attorneys; Bobbitt and one Goldsmith and one Bailey (Tr. p. 1425).[9]

The Davenport Corporation had been created by herself and her husband a number of years past to hold investments (Tr. p. 1423). After her husband's death Errion had come to her and had asked for permission to put his contract in the name of the Davenport Corporation. He explained that he had a contract for ten per cent for his organizational work made with the consent of all the members that were organizing it (Tr. p. 1426). He told her of his associates, Mr. Williams of the State Police, Mr. Kelley, the architect, etc. (Tr. p. 1426 et seq.). He explained how it was all being handled by attorneys, etc. However, he could not take the contract in his own name because of the judgments against him although the judgments had been paid off. They had not been dismissed because the persons who had paid them off, including appellant and her husband, had not yet been repaid their moneys. As soon as he did this, he could then handle the transaction in his own name. In the meantime the Davenport Corporation was licensed to do business in estates and properties and to

[9] The latter two also respected members of the Oregon Bar and known for their ability in corporate work.

handle the moneys of other people etc. He had finally convinced her that this was to be "a very fine industry in which he was associated with wonderful people" and that all she would have to do would be to open a special bank account in the name of the Davenport Corporation upon his behalf and handle his moneys for him under his direction for a short period of time (Tr. p. 1428). (It was because the matter stretched on that she had contacted the witness Piatt to see if she was interested in employment.)

Thus the bank account was established for Errion's use. It was a new account, opened just for this purpose with $45.00 of appellant's money (Tr. p. 1432), which she later withdrew (Tr. p. 1433).

The proceeds of all checks to the Davenport Corporation went to Errion. Their usual custom was for the two of them to take them directly to the bank where she endorsed them and exchanged them for cashier's checks which in turn she immediately endorsed and delivered to Errion (Tr. p. 1444).

None of the moneys from the cooperative or deposited in this account or withdrawn from it, belonged to or went either to the Davenport Corporation or herself (Tr. p. 1445), with this exception: She volunteered that Errion did repay her the sum of $2500.00 upon his prior debt to her (Tr. p. 1460) by returning to her one check from the cooperative in that sum.

Appellant likewise volunteered that Errion promised to pay her ten per cent of the moneys passing through the account for being his "checkwriter" (Tr. p. 1426).

She testified, however, that she never received this or any other moneys from him other than the payment of $2500.00 upon her debt.

There was no evidence introduced to increase this amount or to contradict that the legitimate creditor-debtor-relationship existed between herself and Errion when it was paid and that this was the nature and cause of the payment.

As to the purchase of the plant site, Errion had asked her if the options could be taken in the name of the Davenport Corporation to avoid the owners' raising their price to the cooperative which they might do if they knew it was the buyer (Tr. p. 1467). Likewise, he played upon her vanity by explaining how she had had a great deal of experience in real estate matters and that he thought it would all be done right if she handled it (Tr. p. 1467). She wrote such checks as were required for the options (Tr. p. 1470) and deposited in the Davenport Corporation account for Errion the checks received (Tr. p. 1471). The transaction was handled in escrow and she executed the deed with the consolidated description to the cooperative (Tr. p. 1471). No details of price were discussed with her, and she received none of the money (Tr. p. 1471).

Her cross-examination was vigorous. Everything the prosecution had proven in its case in chief in support of the allegations of fact of the substantive count against appellant's co-defendants was repeated now for whatever suspicion it might cast upon appellant. Counsel for the government argued with her; how could one tell the

difference between the check for $2500.00 whose proceeds she acknowledges as having received—and the other checks in the same form that she stated she endorsed over to Errion (Tr. p. 1510)? Could she not add and subtract so as to be aware of the fact that $25,000.00 remained in the corporation's account after the plant site transaction (Tr. p. 1514)?

The arithmatical calculations made possible by the witness Piatt's testimony, showing that every cent went to Errion, were ignored.

In appellant's own testimony, for example, she had stated that one check of the Davenport Corporation account had the following explanation: From Redding, California, Errion had contacted her requesting her to transfer $10,000.00 from the corporation's account to a bank in that community to enable him to make an advantageous timber purchase. Appellant had transferred the sum to a bank in that community but had refused to execute an authorization that would permit the defendant Errion to draw upon the same (Tr. p. 1463); subsequently, she had authorized a withdrawal of the money by her nephew, a resident of San Francisco, California, whom she learned was unexplainably then in Errion's company's, permitting him to buy the land (Tr. p. 1464).

This was gone over as if to establish dominance over the moneys in this account by appellant (and as if the prosecution had not taken up page after page of the record to establish, as alleged, that it was Errion's account and dominated by him) or, if not that, then a

distrust of Errion upon appellant's part from which her knowledge that he was a scoundrel could be inferred (Tr. p. 1500 et seq.).

She argued right back with counsel for Government that there was, of course, nothing inconsistent in her refusal to permit Errion to make the withdrawal with a desire upon her part to keep the relationship between them upon the plane of his promise to pay her a portion of the moneys he owed her from his supposedly legitimate earnings.

* * *

Appellant will now sketch in briefly the course of Errion's scheme:

What his programs were for the Beaver and National Plywood Cooperatives the record does not reveal, but his program here consisted of the following:

Within the periphery of the Mt. Hood National Forest, and sometime prior to the events to be related, the United States Government had laid out a proposed townsite for a forest community to be named Ripplebrook (Tr. pp. 27-882). In the spring of 1954 Errion gathered about him for a picnic in this area, the witness Bobbitt (Tr. p. 266), an architect by the name of Kelley (an architect of apparent competence in the industrial field being reputed by the testimony to be one of the architects for the Ford Dearborn plant), the defendants Wright, Munkers, Williams and Locke (Tr. p. 272), the wives of some of these men (Tr. p. 1029) and others, upon all of whom he had done some earlier "spade work" (see the testimony of the witness Bobbitt).

Standing upon this ground (Tr. pp. 1263-1264), Errion imbued his guests with enthusiasm for a cooperative whose memberships could be sold at a nominal sum because of preliminary negotiations he had already had with financiers with whom he had had contact (dropping the name of one Guy Myers) and which could build its plant in this area where its members could build their own community and where vast amounts of National Forest timber could be harvested (Tr. p. 1032). It was a glowing picture of a highly feasible project as the witness Bobbitt testified (Tr. p. 295).

Nothing was too small to be seized upon for versimilitude by Errion. On a trip to Ripplebrook with Wright, Munkers, Williams and Vai, they were passed by an impressive Cadillac automobile. Errion casually observed that the Texas people planned to send someone to investigate the area and that he thought that "was them going by now" (Tr. p. 437).

The enthusiasm engendered at this picnic was moved along and Articles of Incorporation were drawn by the witness Bobbitt.

The defendant Wright was the nephew of the defendant Munkers. At this time he had an automobile agency in the town of Redding, California. He had met Errion, supposedly a man moving in the higher circles of finance, through his uncle. On one of his trips to Portland, in the company of the latter, he had gone to the home of the architect Kelley where there had been a group discussing the program for a cooperative (Tr. p. 1258). Then he went on the picnic described

above (Tr. p. 1261) and this was followed by a proposal from Errion that he become sales manager for the sales agency to be established (Tr. p. 1266). Returning to Redding, Wright discussed the matter with the witness Vai, manager of the local bank in that city (Tr. p. 425). He gave him the name of Myers, dropped by Errion, and asked him to inquire through banking circles concerning him (Tr. p. 431). Vai did so and reported to him that there was no doubt whatever of the authenticity of this man or of his ability to engage in such a venture (Tr. p. 432). Returning to Portland, Wright accepted the post. (First, however, he sold memberships for a short period of time in the "Mt. Shasta Cooperative" in California, which barely got started when it ran into difficulties of California law. "Murray" was apparently heading the sales office of Mt. Hood at that time.)

As might be expected, the relatively low price made the sale of memberships easy. A membership in a cooperative is an ownership interest. They were sold upon the basis of the obvious benefits of such an interest, such as job security, together with the representation that their low purchase price was made possible by the plan to obtain outside capital for plant construction; the accompanying representation being that the monies received from the sale of memberships could thus be retained for operating capital. This was Errion's assurance set afoot as early as the picnic referred to and now spread directly to the prospective members, first by Murray and then by Wright, through the sales force.

The initial program called for a membership of 300.

When this number had been sold, Errion proposed a membership of 500, then 550.

When 550 memberships had been sold, the sale was closed and the members held a general meeting at which they elected their officers and directors and ostensibly took over management of the cooperative's affairs. The witness Jack became counsel and numerous committees were appointed from among the membership to take the steps necessary for actual operation. The witness Vai had already been hired as general manager by Errion (Tr. p. 408), a contact made for Vai by the defendant Wright. The witness Tucker was hired as plant superintendent (Tr. p. 773). The V. Prentice Company, industrial engineers, were consulted and drew plans for plant construction (Tr. p. 799). The plant site was purchased in the fashion heretofore detailed.

With the purchase of the site, pressure began to mount upon Errion to produce the expected capital for construction of the plant.

At about this time the Securities and Exchange Commission began investigating Errion's activities in this cooperative. In doing so it created considerable unrest (Tr. p. 1310). There was dissension between the cooperative and the Commission over the conduct of this investigation. The cooperative maintained that Errion had no direct voice in the management of its affairs. (And, indeed, at this time he did not.) Under the guidance of the witness Jack, who associated with him other counsel of prominence for the purpose, the cooperative brought suit against the Commission upon this

basis to restrain the Commission's representatives who were investigating it from hampering its activities (Tr. p. 978). The suit was subsequently dismissed.

The witness Jack was, however, of the opinion that the sale of memberships might have violated the Oregon Blue Sky Laws (Tr. p. 767). Under his direction each member was given the opportunity to withdraw and to obtain a refund of their money at six per cent interest pursuant to Oregon statute (Tr. p. 767). Some accepted, many did not (Tr. p. 101).

Relationship with the S.E.C. boiled down to a demand by that agency of information as to how the plant was to be financed. There was partial assurance that its investigation would cease if it was given adequate proof of the availability of financing (Tr. p. 752).

By this time, Errion, having failed to keep up the payments on a fraud judgment for which there could be body arrest, had fled to Vancouver, Washington to avoid the same. Notwithstanding, he was apparently able to explain this judgment and his flight to another state so plausibly that reputable representatives of the cooperative still met with him in an attempt to negotiate for the expected capital (Tr. p. 769).

Turning these negotiations to his own advantage, Errion engineered what was to be his final coup. Acting with Munkers as a purported mediary to the cooperative for the syndicate of his now "Texas oil men," he gave as a condition to their lending the necessary $4 or $5 million dollars, the establishment by the cooperative of a

new and separate corporation to which the majority of the cooperative's money would be transferred. This corporation would in turn use this money to buy the first bonds to be issued by the syndicate to show its "good faith" (or some such) (Tr. p. 65-761). Negotiations as to precise terms was carried on. The witness Snyder, an officer and director, consulted with Errion and reported back to the other officers and directors (Tr. p. 41). The witness Jack was kept busy attempting to put into instruments to be executed the terms being agreed upon.

To put these conditions and terms in writing, Errion took a to-whom-it-may-concern letter, setting them forth and ready for the signature of one purportedly signing upon behalf of the syndicate, to the witness Howard. This letter was written upon a blank sheet of paper without a letterhead.

The witness Howard testified that he was a Christian Science practitioner whom Errion had consulted for treatment (Tr. p. 521). During the course of these visits, Errion had talked of his plan for the working man that was this cooperative (Tr. p. 522). Howard testified that Errion came to him with this letter and had explained that all would be lost if he, Howard, didn't sign it. Believing in the man, the witness Howard had done so (Tr. p. 523).

It was as simple as that; apparently in a single interview Errion prevailed upon this man whose calling speaks of his obvious moral character, to sign a lie dealing with hundreds of thousands of dollars.

From Howard's testimony, however, it is not clear what name he signed. Munkers testified that he had such a letter signed "Howard" for a period of time (Tr. p. 1059), but later he showed a letter to the witness Jack signed "P. R. Phillips" (Tr. p. 756).

The witness Jack had been pressing for assurance as to the financing because of the S.E.C.'s investigation. He was brought to Errion in Vancouver by Wright, and there left alone in the room with the defendant Munkers who stated that he was the contact man for the financial backers and who then showed him this letter as a letter of commitment from the "backers" (Tr. p. 756). Challenged by Jack as to the authenticity of the signature, Munkers stated that he knew the man's signature although he had not seen him sign it (Tr. p. 757).

The next that occurred was revealed by the witness Schulberg (the office secretary of the cooperative; Tr. p. 805). Pursuant to a telephone arrangement by a member of Mr. Jack's firm, she, the defendant Wright and the witness Tucker (hired by the cooperative as plant engineer, Tr. p. 45) called upon the witness Howard Rankin, an attorney, who had ready for them Articles of Incorporation for a corporation to be known as the Clackamas County Building Association for which they were to be the incorporators (Tr. p. 815). These were executed and filed. The parties then met again in Mr. Rankin's office and stock certificates were issued, which each endorsed in blank in his presence (Tr. pp. 778-815). A stockholder's meeting was held and Tucker was elected president, Wright treasurer and Schulberg

secretary. A resolution was passed authorizing a bank account and the signature of the latter two for withdrawals therefrom.

The certificates were then taken by the defendant Wright to the witness Piatt; for delivery to Errion (he thought, Tr. p. 1320). Actually, however, she delivered them to the defendant Munkers (Tr. p. 652). Munkers acknowledged having received them from her, but testified that he didn't know why the witness Piatt had given them to him (Tr. p. 1135).

From the beginning of the purported negotiations with the "Texas oil people" through Errion, the directors of the cooperative and its counsel had been kept advised of the proposal of setting up the separate corporation. As a result, by the time it was actually established, there had already been authorized by the Board of Directors a transfer of $350,000.00 of the cooperative's funds to it (Tr. p. 61-62). A check in the sum of $290,000.00 was now drawn by the president, the defendant Locke, and signed by him and the witness Snyder (Tr. p. 23). It was given to the defendant Wright, who, together with the witness Schulberg, went to a bank (in which an account had already been established by the witness Schulberg through a deposit of $1,000.00 received by her from the witness Piatt; Tr. p. 824) and deposited it (Tr. p. 826). The witness Schulberg testified that she had qualms about this and, according to her, so did the defendant Wright (Tr. p. 828).

The witness Rankin, called to testify by the defendant Wright, testified that he had a call from the defend-

ant Wright telling him of the deposit and that he had then informed Wright that the stock certificates, having been endorsed in blank, put the $290,000.00 in the control of whoever held them through the simple procedure of a new stockholder's meeting, new officers and a new signature card at the bank (Tr. p. 1165). The witness Schulberg telephoned the witness Jack (Tr. p. 832). The defendant Wright had also seen the witness Jack as well as called the witness Rankin (Tr. p. 1324). The defendant Wright now informed the witness Schulberg that they would withdraw the money from the account of the Clackamas County Building Association and return it to the cooperative's account upon their own (Tr. p. 832). Their original deposit had been upon a Friday and all this occurred over a weekend. Upon Monday morning they went to the bank as soon as it opened, withdrew the $290,000.00 and redeposited it in the cooperative's account (Tr. p. 833).

The "negotiations"—and Errion's position with the cooperative—collapsed. The memberships rejected those defendants still with it. At a separate meeting they determined to establish what plant they could with the moneys on hand. A sawmill was constructed, but after a short period of time (Tr. p. 224) the venture failed (Tr. p. 47).

The investigation of the Securities and Exchange Commission continued and terminated with the present indictment. All of the accused were found guilty upon all counts submitted with the exception of the defendant Martin who was acquitted.